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THE INDIAN LAW REPORTS,

BOMBAY SERIES,

CONTAINING

CASES DETERMINED BY THE HIGH COURT AT BOMBAY, AND BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL ON APPEAL FROM THAT COURT.

REPORTED BY

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VISHNU GHANASHAM, *Vakil, High Court*

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JUDGES OF THE HIGH COURT.

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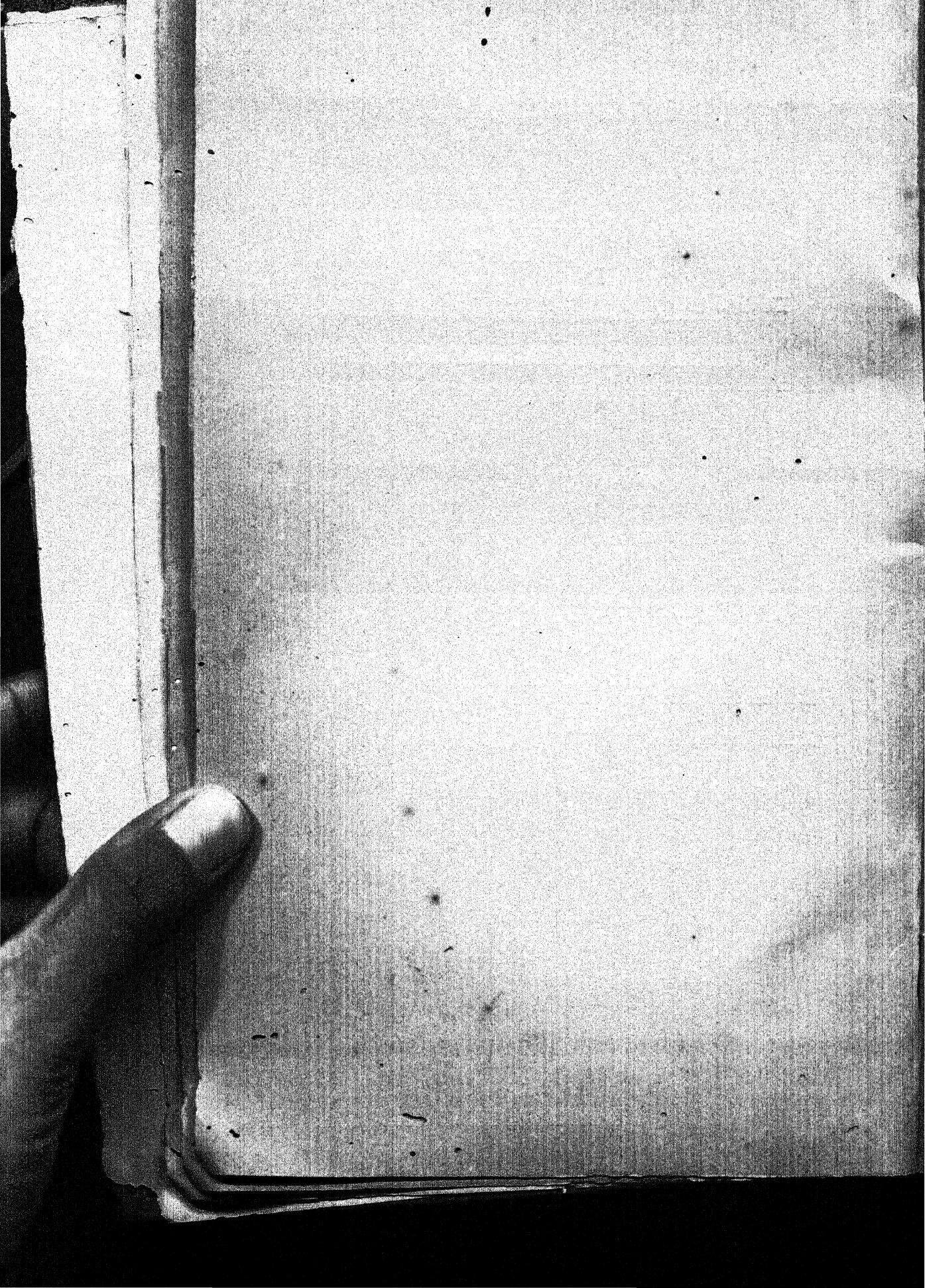

ERRATA ET CORRIGENDA.

Page 26, note (2), add "see also *Maya bin Nag Patel* v. *Luxumon*, 3 Morris S. D. A. Rep. 336."

„ 29, in notes. Note (4) should be numbered (5), and note (5) should be numbered (4).

„ 30, note (1). See also Heffter (3rd ed. Paris), p. 150, pl. 75, and as to fisheries p. 152.

„ 30, note (2). After the figures "63" and before the words "Reporter's note," add "decided since the case decided in the text, and see also the subsequently passed statute 40 and 41 Vic. c. 73, (1878)."

„ 31, last line, after the word 'Gens' add Vol. I, page 97, Liv. II, Tit 1, ch. I, pl. 105. (3rd ed.)

„ 42, lines 26 and 27 from top, *for* "in the sea of Yerangal, or of any other part of Salsette" *read* "in the sea off Yerangal or off any other part of Salsette."

„ 42, note (1), add "see also *Bapuji Ragunath* v. *Sinvarkana*, 2 Borr. 376, (reprint), which was a suit by the Patil of Sirgaon for a fee on each fishing boat."

„ 52, note (1), add "see *Gabbett* v. *Clancy*, 8 Ir. L. R. 299."

„ 137, line 3 from foot of the page, *for* "acquiescence or forbearance" *read* "a quiescence or forbearance, etc."

„ 172, line 4 from "top, *dele* the full-stop after the word 'allegiance and substitute ":—"

„ 207, line 10, from top, *for* "trila" *read* "trial."

„ 219, at the end of the case of *Ratansi Kalianji and others* insert the words "*Motion refused.*"

„ 265, in notes. Note (2), *for* "4 Beng. L. R." *read* "6 Bom. H. C. Rep. 258." Note (3), *for* "9 Bom. H. C. Rep. 92" *read* "4 Beng. (F. B.) 11." Note (4), *for* "6 Bom. H. C. Rep. 258, A. C. J." *read* "4 Beng. L. R. Appx. 35." Note (5), *for* "4 Beng. L. R. 35 Appx." *read* "9 Bom. H. C. Rep. 92."

„ 421, line 2 from top, *for* "the two limited meanings" *read* "the too limited meaning."

„ 605, line 7, from foot of page. After the word "events" insert "(2),"

„ 611 ,in notes, before "Tagore's translation" insert "(2)."

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THE

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[APPELLATE CIVIL JURISDICTION.]

Before Sir M. R. Westropp, Knight, Chief Justice, and Mr. Justice Kemball.

PITAMBER NARAYENDAS AND ANOTHER (DEFENDANTS AND APPELLANTS) *v.* VANMALI SHAMJI (PLAINTIFF AND RESPONDENT).*

1875. October 11.

Mortgage—Power of sale—Lands situate in the Mofussil—Deed in English form.

A sale, without the intervention of a Court of Justice, of mortgaged lands situate in the Mofussil of Bombay, under a power of sale, contained in an indenture of mortgage in the ordinary English form, is valid, if due notice be given to the mortgagor of the mortgagee's intention to sell, and the sale be fairly conducted.

Position of a mortgagee selling under his power of sale, explained.

THE plaintiff, as purchaser at an auction sale, held under the power of sale contained in an English mortgage-deed, of certain lands situate in the mofussil of Bombay, sued to eject the mortgagor, the first defendant, and his tenant, the second defendant, and to recover mesne profits from them. The Subordinate Judge made a decree in favour of the plaintiff; against that decree the defendants preferred this regular appeal. The only question argued at the hearing of the appeal was whether a sale of lands in the mofussil, under the power of sale contained in an indenture of mortgage in the ordinary English form, was valid.

* Regular Appeal No. 16 of 1875.

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The Honourable Rao Saheb V. N. Mandlik, for the appellants, cited *Bhuwanee Churn Mitr* v. *Jaykishen Mitr*, (1) Macpherson on Mortgages, pp. 45 to 47, 91 and 92 (5th Edition), and *Keshará Krishna Joshi* v. *Bhawanji Bábáji*.(2)

Shántárám Náráyen for the respondent.

WESTROPP, C.J.:—Pitámber Náráyendás, described, in the mortgage to which we shall next refer, as a Hindu inhabitant of Bombay, by indenture of mortgage of the 25th October 1871, made in the ordinary English form, in consideration of Rs. 15,000 duly advanced to him by the Land Mortgage Bank of India, Limited, an English Joint Stock Company, having its head office in London, and a branch office in Bombay, where the mortgage transaction was arranged, mortgaged (with the usual proviso for redemption) to that Bank in fee certain lands in the villages of Girya and Bassein in the Taluka of Bassein and Collectorate of Thana, and a bungalow and stable in the same village of Bassein, to secure that sum, which, by that indenture, he covenanted to repay to the Bank in three instalments, viz., Rs. 2,500 on the 25th October 1872, a further sum of Rs. 2,500 on the 25th October 1873, and the balance of Rs. 10,000 on the 25th October 1874, with interest on the sum advanced, or so much thereof as should from time to time remain due, at the rate of 10 per cent. per annum in equal quarterly payments, viz., on the 25th January, 25th April, 25th July, and 25th October in every year—the first payment to be made on the 25th January 1872; and that, if any quarterly payment of interest were in arrear for more than one calendar month after becoming due, he would pay compound interest on the amount of interest in arrear at the rate of 10 per cent. per annum. The mortgage further provided that, "in default of payment of the said instalments of Rs. 2,500 each within one calendar month from the times hereinbefore respectively appointed for the payment thereof, the said sum of Rs. 15,000, or the balance thereof then due, with interest thereon, shall immediately thereupon become payable to the said Land Mortgage Bank of India, Limited, their successors or assigns, and it is hereby provided and declared that it shall be lawful for the said Land Mortgage Bank, &c., at any time or times after the said principal

(1) S. D. A. Rep. Calc. 1847, p. 354. (2) 8 Bom. H. C. Rep. 142, 144, A. C. J.

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sum of Rs. 15,000 shall become due and payable whether by lapse of time or under the provisions hereinbefore contained, without any further consent on the part of the said Pitámberdás Náráyendás, his heirs, executors, administrators, or assigns, to sell" the said mortgaged premises "either by public auction or private contract, with power upon any such sale to make any stipulation as to title, or evidence, or commencement of title, or otherwise, which the said Land Mortgage Bank, &c., shall deem proper, and also with power to buy in, or rescind, or vary any contract for sale, and to resell without being responsible for any loss occasioned thereby, and for the purposes aforesaid, or any of them, to execute and do all such assurances and things as they shall think fit. Provided always, and it is hereby agreed that the said Land Mortgage Bank, &c., shall not execute the power of sale hereinbefore contained unless and until default shall have been made in payment, at the time hereinbefore appointed for payment thereof, of some principal money or interest; the payment whereof is intended to be hereby secured, and they shall have given a notice in writing to the said Pitámberdás Náráyendás, his heirs, executors, administrators, or assigns, to pay off the moneys for the time being owing on the security of these presents, or left a notice in writing to that effect at or upon some part of the said premises, &c., and default shall have been made in payment of the whole or part of such moneys for one calendar month from the time of giving or leaving such notice, or unless and until the whole or some part of some quarterly payment of interest, which shall become due on the security of these presents, shall have become in arrear for one calendar month; and every such notice as aforesaid shall be sufficient, though not addressed to any person or persons by name or designation, and notwithstanding the person or any of the persons affected thereby may be unborn, unascertained, or under disability." Then followed the usual provisoes exempting the purchaser at any such sale from inquiring whether any of the cases had happened justifying a sale or otherwise as to its propriety or regularity, and leaving the mortgagor Pitámberdás Náráyendás to his remedy in damages only against the Land Mortgage Bank for any irregularity or impropriety in the sale, also exempting the purchaser from the necessity of seeing to the

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due application of the purchase money. It was further agreed that the Bank should, out of the proceeds of sale, in the first place pay the expenses of the sale, in the next place apply such proceeds in or towards satisfaction of the amount due to it upon the mortgage, and lastly pay the surplus (if any) to Pitámberdás Náráyendás, his heirs, executors, administrators and assigns. The mortgage also contained the usual clause of entry and covenant for further assurance, and was duly registered, the mortgagor, however, remaining in possession of the mortgaged premises, Mr. J. H. Littlewood, an Indo-Briton, being, as his tenant, in possession of the bungalow and stable.

Pitámberdás Náráyendás failed to pay the instalments of the principal and also the interest at the times stipulated. After due notice to him the mortgaged property was advertised by the Bank for sale about the middle of 1872; but at his request, and on making some payments on account, the sale was not then persisted in. His defaults in payment of interest and instalments subsequently continuing, notice was sent by the Bank to him by post on the 28th of October 1873 of their intention to sell the mortgaged premises if he did not pay the amount due upon the mortgage. He has denied receipt of that notice; but the evidence perfectly satisfies us, as it also did the Subordinate Judge, that the notice reached Pitámberdás in due course of post. We are satisfied also that he fully understood the nature of the provisions in the deed of mortgage, notwithstanding a faint effort made on his behalf to induce the Court below to believe the contrary. The sale took place on the 10th of December 1873 by public auction in Bombay, conducted by respectable auctioneers, Messrs. Crawford & Co. The intended sale was for eight or ten days previously duly advertised in Bombay in three English newspapers and in three native newspapers, and hand-bills, announcing it, were sent to the site of the property and there distributed four days previously to the sale.

There were upwards of twenty bids for the mortgaged property, which was eventually knocked down to the present plaintiff (respondent) Vanmali Shámji for Rs. 16,500, which he paid to the Bank, and the property was conveyed to him by that Land Mortgage Bank by a regular conveyance in the English form, dated the 14th January 1874. In the Court below, the first defendant

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the mortgagor, alleged that the sale was at an undervalue, and that the property was really worth Rs. 80,000. This, however, he failed to establish, and the offer made in that Court by the purchaser Vanmali Shámji, to let the mortgagor have the property back again if he would repay to the purchaser the amount of his purchase money, Rs. 16,500, with interest at 9 per cent. per annum, was, as the Subordinate Judge observed, a clear proof that the purchaser had not made a very valuable bargain.

He brought the present suit in the same year to eject the mortgagor Pitámberdás Náráyendás from the lands, and to recover from him mesne profits, Rs. 584-9-4; and also to eject his tenant, Mr. Littlewood, from the bungalow and stable, and to recover from him as mesne profits, or rent, Rs. 366-10-8, pursuant to a notice which he had given to him some months previously that, if he did not give up possession of the last-mentioned premises, the purchaser would hold him responsible for rent at the rate therein specified.

The Subordinate Judge made a decree in favour of the plaintiff in the terms prayed by his plaint.

Several grounds of defence were put forward in the Court of the Subordinate Judge, some of which were repeated in the memorandum of appeal; but the only point which the learned pleader for the appellants, the Honourable Mr. V. N. Mandlik, insisted upon in this Court, was that the Land Mortgage Bank had not power to sell the mortgaged property without the intervention of a Court of Justice. He relied upon a decision in 1847 of the Sadr Adalut for Bengal, *Bhuwanee Churn Mitr* v. *Jaykishen Mitr* [1] (see also Macpherson on Mortgages, 5th Edition, p. 45), in which that Court refused to recognize the validity of such a power as to lands in the Bengal mofussil. After making certain remarks upon what the Court deemed to be the impolicy of upholding such a power, it, speaking of the Bengal regulations, said: "The regulations will be searched in vain for any express enactment prohibiting the sale of a mortgaged estate under a power of sale. But such a power is repugnant to the principles of the regulations enacted by Government for regulating the transfer of immoveable property in satisfaction of debt

[1] S. D. A. Rep. Calc. 1847, p 354.

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in general, and in satisfaction of debts on mortgage in particular. The regulations do not sanction, in any case, the transfer of immoveable property in satisfaction of a debt, without the intervention of a public officer, except such transfer be by the direct and immediate act of the proprietor himself." The first observation to be made with regard to that case is that there are not in the Bombay regulations, as in those of Bengal, any provision regulating the foreclosure of mortgages. The next remark to be made is that Mr. Justice Macpherson, in his book on mortgages (pp. 46, 47), expresses strong doubts as to the supposed impolicy, if that be a legitimate argument, of sanctioning a power of sale; and, lastly, that it is mentioned in a recent case before L. Jackson and McDonell, JJ., in the High Court of Calcutta[1] that *Bhuwanee Churn Mitr* v. *Jaykishen Mitr*[2] has been overruled by a subsequent decision of a Division Bench of the High Court, *Sonatum Bysack* v. *Koonjo Behari Bysack* (unreported), where the point as to the validity of a sale of lands in the Bengal Mofussil under a power contained in a mortgage arose incidentally upon a question of costs. The validity of such a power was mooted in *Bhanoomutty Chowdrain* v. *Premchand Neogee*,[3] and L. Jackson, J., said that, if called upon to determine it, he and McDonell, JJ., would have felt considerable difficulty. They disposed of the case upon another ground, namely, that there had been no notice given to the purchaser under a power of sale in an English mortgage deed of 1862, of foreclosure proceedings by the holder of a deed of conditional sale of 1864, and held that a suit for possession by the widow of the latter was, therefore, unsustainable against the purchaser under the mortgage of 1862. Certain observations by Mr. Justice Melvill in *Kesharáv Krishna Joshi* v. *Bhawanji Bábáji*[4] on the Bengal Sadr Adalut decision, were also relied upon by Mr. V. N. Mandlik; but our brother Melvill does not appear to have been informed that the Bengal Sadr Divani Adalut decision had been overruled even in Bengal itself by a Division Bench of the High Court at Calcutta. My brother Kemball in *Kesharáv Krishna Joshi* v. *Bhawanji Bábáji*[5] expressed his opinion to be in favour of the validity of a sale under a power contained in a

(1) *Bhanoomutty Chowdhrain* v. *Premchand Neogee*, 15 Beng. L. R. 28; see p. 31.
(2) S. D. A. Rep. Calc. 1847, p. 354.
(3) 15 Beng. L. R. 28.
(4) 8 Bom. H. C. Rep. 142; see p. 144, A. C. J.
(5) 8 Bom. H. C. Rep. 142; see p. 149, A. C. J.

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mortgage of lands in the Bombay mofussil, there being nothing either in the spirit or the letter of the Bombay regulations to the contrary. And I may observe that there is not any inconsistency in maintaining the validity of a sale under such a power with the decision of our predecessors in this Court in *Rámji* v. *Chinto*[1] which has been followed by us. It is to the effect that a deed of mortgage, with a clause of conditional sale, shall be regarded as redeemable, although the time fixed, on which the mortgage was to become converted into a sale, has passed. In the latter case, if the clause of conditional sale be enforced, the property, howsoever it may exceed in value the amount of the advance on mortgage, becomes wholly vested in the mortgagee, which is unquestionably inequitable, whereas a mortgagee with a power of sale, not only cannot, either directly or through the medium of an agent or a trustee, himself become the purchaser under the power, *Robertson* v. *Norris*,[2] affirmed on appeal ;[3] nor can his agent, who has acted in surveying the property and receiving the interest, purchase even on his own account from the mortgagee under the power, *Orme* v. *Wright*,[4] *In re Bloye's Trusts*;[5] but when the mortgagee, without the intervention of the Court, sells under the power, after deducting the fair expenses of the sale and the amount due to himself on the mortgage, he must, as a trustee for the mortgagor, make over the surplus to him, if there be no assignee of the mortgagor or incumbrancer puisne to the selling mortgagee entitled to receive it or a portion of it. While a suit for redemption is pending against a mortgagee, he cannot sell under his power of sale, *Rhodes* v. *Buckland*,[6] nor can he sell without notifying his intention to the mortgagor, *Anonymous*.[7]

In the present case Pitámberdás, the mortgagor, must have known perfectly well that, dealing as he was with an English Company, which had an established form for the deeds of mortgage required by it from persons borrowing money from it, he could not have obtained the loan which was made to him without giving such a power of sale as is contained in the mortgage of the 25th October 1871. In *Bholanath Coondoo Chowdry* v. *Unodapersad Roy*,[8] which is not in other respects in point in this

(1) 1 Bom. H. C. Rep. 199.
(2) 1 Giff. 421.
(3) 4 Jur. N. S. 155.
(4) 3 Jur. 19.
(5) 1 M. and G. 488.
(6) 16 Beav. 212.
(7) 6 Madd. 10.
(8) 1 Boulu. 79 ; see p. 101.

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case, Colvile, J., said: "The defendants have taken on land, in the mofussil, a mortgage in the English form: the inference, therefore, is strong that they intended to contract with reference to the English law, and to enforce their rights according to that law." Similar remarks have often been made in cases where the parties (not English) have thought proper to adopt the English form of contracting. That such was the intention of the parties, where the mortgagees are an English Joint Stock Company, having their chief office in London, would seem to be *à fortiori*. We fully believe that to have been the understanding of the mortgagor Pitámberdás at the time of the execution of the mortgage. Sales, under such a power as we have here, have always, when not open to special objection, been upheld in the Island of Bombay; and unless we find the law to be otherwise in the Bombay mofussil, we see no sufficient reason for imposing upon parties contracting with respect to land situated there, a disability which does not exist in the Island. We are unable to find either enactment or decision which invalidates a sale under such a power in a mortgage affecting lands in the Bombay mofussil.

Under power of sale, such as that in this case, neither the concurrence of the mortgagor nor of any person claiming under him, whose claim is puisne to that of the selling mortgagee, is necessary to the validity of the sale. Sugden, Vendors and Purchasers, chap. X, section IV, pl. 57 (11th Ed.), p. 522, and the cases there referred to *in notis*, and *Alexander* v. *Crosbie*,[1] affirmed on appeal.[2] The provision that any impropriety or irregularity in the sale shall be the subject of a suit for damages, and shall not affect the lands, when in the hands of a purchaser under the power, is beneficial to the mortgagor as well as to the mortgagee in this that it tends to secure a better price at the sale.

The sale appears to have been fairly conducted, and with all due notice to the mortgagor, so that if he had been willing and able to redeem, he might have done so before the sale. And we see nothing in the conduct of the Land Mortgage Bank which amounted to a waiver of their right to sell.

The decree must be affirmed with costs.

Decree affirmed.

(1) 6 Ir. Eq. Rep. 513. (2) 1 Jones and LaTouche 666.

[TESTAMENTARY AND INTESTATE JURISDICTION.]

Before Mr. Justice Green.

IN THE GOODS OF NATHIBAI.

1876 September 21.

JAIKISONDAS GOPALDAS, APPLICANT;
HARKISONDAS HULLOCHANDAS AND MATHURADAS PURSHOTAMDAS, CAVEATORS.

Hindu Law—Marriage—Asura form—Nágar Vissá Vania Caste—Palu—Inheritance—Practice—Costs.

The Hindu Law, at least as evidenced by usage, though it permits the Asura form of marriage among the mercantile and servile classes, does not prohibit to those classes the more approved forms of marriage.

The form of marriage in use among the Nágar Vissá section of the Vania caste corresponds to one or other of the approved forms, and not to the Asura, and the giving of *palu* does not constitute a purchasing of the bride.

Property inherited from her deceased husband by a childless widow, among the Nágar Vissá Vanias, at her death, intestate, devolves on the relations in blood, on the mother's side, of the husband in preference to the heirs and next of kin of the widow.

An applicant for letters of administration to the estate of a widow, having concealed the existence and claims, of which he was aware, of the relatives of the deceased husband of the widow, on the application being dismissed was ordered to pay the costs of the application and of the caveats entered by some of the relatives of the deceased husband.

NATHIBAI, the widow of Bhoga Pitámber, a member of the Nágar Vissá section of the Vania caste, died intestate and without issue on 19th February 1876, leaving property within the local jurisdiction of the High Court of Bombay. The applicant, as the nearest relation in blood to Nathibái, applied for letters of administration to her estate and effects, but was opposed by the caveators, a first cousin, and a first cousin once removed on the mother's side, of Nathibái's deceased husband, Bhoga Pitámber, on the ground that the property left by Nathibái was part of the estate of her deceased husband inherited by her at his death, which at her death ought to go to his heirs and next of kin, and not to her's. To this the applicant replied that the property left by Nathibái was her separate property; and also that she had been married to Bhoga Pitámber according to the Asura form of marriage, the only form used amongst the Nágar Vissá Vanias, and therefore the property, even if inherited by her from her husband,

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would at her death go to her heirs and next of kin and not to her husband's. The applicant, though aware of their existence and their claims, had not brought to the notice of the Court, in his affidavit, the fact that there were relations in blood (the caveators and others) of Bhoga Pitámber, the husband of the intestate Nathibái.

The principal question in the case was, whether the form of marriage in use amongst the Nágar Vissá Vanias corresponded to the Asura, or to one of the forms of marriage approved by the Hindu Law, and depended for its solution on the evidence of the ceremonies observed amongst the Nágar Vissá Vanias prior to, and at the time of, the celebration of the marriage.

Marriott, Advocate General (Acting), and *Kasinath Trimbak Telang*, for the applicant, cited *Vijiarangam* v. *Lakshuman*,[1] and Stokes H. L. Books, p. 101.

Farran, for the caveators, cited *Mussumat Thakoor Deyhee* v. *Rai Baluk Rám*,[2] and *Bhugwandeen Doobey* v. *Myna Báee*.[3]

GREEN, J.:—This is an application by one Jaikisondás Gopaldás for a grant of letters of administration to himself of the goods, chattels, rights, and credits of the above-named Nathibái, who died, on the 19th February 1876, in Bombay, intestate, a widow and without issue, and leaving property within the Presidency of Bombay and within the local jurisdiction of this Court.

To this application a *caveat* has been entered by the above-named Harkisondás Hullochandás and Mathuradás Purshotamdás. One Motilal Damodhar (though not having himself entered a *caveat*), has filed an affidavit in support of the *caveat* so as aforesaid entered. One Ganpatlal, the son of one Dulabdás, has presented a petition and appeared at the second day's hearing, the object of the petition being to bring to the attention of the Court that he and his said father object to the application being granted. The question for decision is, whether the applicant, as nearest in blood to the deceased Nathibái, is entitled to her property, and to have administration of her estate granted to him, as against the relations in blood to the deceased husband of Nathibái, Bhoga Pitámber. The applicant

(1) 8 Bom. H. C. Rep. 244 ; see page 254, O. C. J.

(2) 11 Moore I. A. 139 ; see page 175.

(3) 11 Moore I. A. 487 ; see page 512.

is a nephew of Nathibái, being the son, and, so far as appears, the only son, of one Gopaldás Candás, the brother of Nathibái.

According to the affidavit of the applicant, Pitámber (the father of Bhoga Pitámber) died about seventy years ago, leaving an only son the said Bhoga, "and no brother or other male member of his family."

Bhoga Pitámber died in Bombay in the month of Margsar Shud, Samvat year 1928 (*i.e.*, between 13th December and 26th December 1871). The applicant's affidavit is wholly silent as to the existence of any blood relations of Bhoga Pitámber through his mother Jamnábái.

These blood relations of Bhoga Pitámber, through his mother Jamnábái, as appearing by the affidavit of the caveators and the said Motilal Damodhar, are as follows :—

The maternal grand-father of Bhoga Pitámber was one Candás. He appears to have left three sons, viz., Iswardás Candás, Hullochandás Candás, and Damodhardás Candás, and two daughters, namely, Casibái, and the said Jamnábái. Iswardás Candás left two sons, Narrotumdás and Purshotamdás. Narrotumdás Iswardás left a son, Gordhandás Narrotumdás, and Purshotamdás Iswardás left a son, the caveator, Mathuradás Purshotamdás. Hullochandás Candás left two sons, Lackmidás and Harkisondás, the latter being the caveator first above named. Lackmidás Hullochandás left five sons, Achratlal, Muggonlal, Pohonchabái, Lalbái, and Nánábái, who are not in any way party to these proceedings Damodhardás Candás left a son, Dulabdás, who in the petition of his son (the said Ganpatlal) is stated to be living at Cambay, and to be of the age of seventy years. Casibái, one of the two daughters of Candás, was the mother of the above-named deponent Motilal Damodhar. The other daughter of the same Candás was the said Jamnábái, the mother of Bhoga Pitámber. The application of Jaikisondás Gopaldás is thus, it will be seen, opposed by the *caveat* of a first cousin of Bhoga Pitámber through the mother of the latter, namely, Harkisondás Hullochandás, and of a first cousin once removed of the said Bhoga Pitámber, also through the mother of the latter, namely, Mathuradás Purshotamdás, and these two *caveats* are supported by the affidavit of Motilal Damodhar (also a first cousin of Bhoga Pitámber through the mother of the latter), and by Ganpatlal Dulabdás

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(a first cousin once removed). As to the property left by Nathibái, it consisted, according to the affidavit of the applicant, of cash, ornaments, jewels, and furniture of the value of Rs. 3,500, and outstanding claims amounting to Rs. 2,000. According to the caveators' affidavit, Bhoga Pitámber (who in his lifetime was in the service of a Khoja as Metha) left property at his death, consisting of moveables of the value of about Rs. 10,000, and a house at Cambay of the value of upwards of Rs. 1,000, and his widow Nathibái, upon his death, possessed herself of the moveable property left by him in Bombay and spent about Rs. 4,000 in funeral and charitable ceremonies performed on and after his death. The same affidavit also states that the moveable property left by Nathibái was a portion of the property left by her deceased husband, and which came to her hands at his death, and that she did not leave any peculiar separate or self-acquired property. It does not seem to be disputed between the applicant and the caveators that the moveable property, of which Nathibái died possessed, had, in fact, come to her from her husband, whether, as the applicant says, partly by inheritance, and partly by a sort of gift by the husband in contemplation of death, or, as the caveators say, wholly by title of inheritance. It is not necessary to consider whether Nathibái had the right to expend so large a portion, as she seems to have done, of the property coming to her from her husband; the question here is only as to the rights of the parties in respect of what has remained. Nor is it necessary to discuss the question whether property coming to a widow by inheritance from her husband is or is not in the strict sense of the word *stridhan*. It appears to be quite settled (see *Mussumat Thakoor Deyhee* v. *Rai Baluk Rám*, [1] *Bhugwandeen Doobey* v. *Myna Báee*, [2] and *Vijiarangam* v. *Lakshuman* [3]) that property derived by a childless widow by gift or inheritance from her husband passes, or at any rate so much of it as remains, passes, on her death, to the heirs of her husband, and not to her own blood, except in the case of a widow who had been married to her deceased husband in some other than one of the four approved or more reputable forms of marriage. The parties in the present case belong to that section of the Vania caste called Nágar Vissá Vanias, and are reputed to belong to

(1) 11 Moore, Ind. Ap. 139.

(2) 11 Moore, Ind. Ap. 487.

(3) 8 Bom. H. C. Rep. 244, O. C. J.

the Vaisá or third of the original four great sub-divisions of the Hindu race. The applicant in his original affidavit says nothing about the form of marriage by which Nathibái was united to Bhoga Pitámber. The caveators, in their affidavit, however, allege that "according to the immemorial and universal custom of the Nágar Vissá Vania caste, all the property left by a childless widow, and acquired by her from her husband and from any relation of her husband, or from any or either of them, belongs at her death to the heirs and next of kin, according to Hindu Law, of her deceased husband." The applicant's affidavit in reply alleges that Bhoga Pitámbér before his death made a gift of all his property to his wife, the said Nathibái, and that the property left by the said Nathibái consists of her separate property, and, further, that amongst the members of the Nágar Vissá Vania caste one form of marriage only prevails; that according to the best of the deponent's knowledge, information, and belief, that form of marriage is the *Asura* form, and that according to that form Nathibái was married to Bhoga Pitámber.

The essential characteristic of the *Asura* form of marriage appears to be the giving of money or presents by the bridegroom or his family to the father or parental kinsmen of the bride, or, in fact, a sale of the girl by her father or other relation having the disposal of her in marriage in consideration of money or money's worth paid to them by the intended husband or his family. In Manu it is described thus: "When the bridegroom having given "as much wealth as he can afford to the father and parental kins- "men and to the damsel herself takes her voluntarily as his bride, "that marriage is called *Asura*," and by Yajnavalkya, "an *Asura* "marriage is contracted by receiving property from the bride- "groom." In Steele's Summary, p. 31, under the title "Marriage" "*Usoor* (or Asura) is where the girl is taken in exchange for wealth "and married. This species is peculiar to the Vaisa and Sudra "castes. The sale of a girl in marriage is forbidden."

In the four approved or more reputable forms of marriage, no such presents are made, and in the castes observing those forms anything of the nature of a present to the girl's relatives appears to be carefully avoided as something disgraceful. The old Hindu Law books no doubt speak of the *Asura* form of marriage as being

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permitted to the mercantile and servile classes (*i.e.*, the Vaisás and Sudras) and as not being permitted to the two higher classes. But I do not find anything in the texts cited to show that the *Asura* form is obligatory on the mercantile and servile classes, or that the four more approved forms are not permissible to them, as well as to the two higher classes. As the *Asura* form is said to be permitted or peculiar to the mercantile and servile class, so the *Rákshasa* is permitted or peculiar to the warrior class. But this does not mean that it is obligatory on them, but only allowable. If at least the only form in which a warrior could get a lawful wife was the *Rákshasa* which Manu describes thus: "The seizure of a maiden by force from her house, while she "weeps and calls for assistance, after her kinsmen and friends "have been slain in battle, or wounded, and their houses broken "open," it would of itself account for the supposed extinction of this class without the alleged victories of Pursharám.

It must, it appears to me, in the absence of reliable evidence as to the form in fact observed in each particular case, be a matter of inquiry what is the form in actual use among the caste, or section of a caste, to which the parties, the form of whose marriage is in question, belong, bearing in mind also the strong tendency generally observable among the lower castes and section of castes, to attempt to adopt, so far as possible, the religious and social forms and usages of castes and sections of castes considered higher. In the present case the evidence, on the part of the applicant, that, on the occasion of Nathibái's marriage, her mother (for, according to their evidence, her father was then dead) received a present of Rs. 1,000 from Bhoga Pitámber, cannot, in my opinion, be relied upon. The witness who states this circumstance is Goverdundás Narrotumdás (maternal uncle of the applicant, and a different person, apparently, from the abovementioned Gordhandás or Goverdhandás Narrotumdás, the grandson of Iswardás Candás). He says that he learnt the fact from Bhoga Pitámber himself. But the same witness states that except this instance he cannot mention any other cases of presents made to the father, and that such payments are made privately, and he would not hear of them. He says further that to receive such presents is considered disgraceful. Now this of itself makes it rather unlikely that Bhoga Pitámber should have told the

witness that such a present was made on the occasion of his own marriage with Nathibái. The same witness stated also that when he had his own daughters married, he did not receive anything, except *palu*, and, in fact, he has no instances to give of any usage in this caste for anything to be given by the intended husband, except what is called *palu* and ornaments according to custom. He produced a written contract, entered into some 10 or 12 years ago, on the occasion of the marriage of a daughter of his sister's husband Gopaldás. The document is addressed to one Shah Dayabhái Rámáchandra, the brother of the then intended husband, and signed by Gopaldás Candás, the father of the intended wife. It provides as follows:—"The betrothal of my daughter Behen "Kasi to your brother Shah Parmanand has been agreed to, as for "her *palu* Rs. 701, and a *vák* (armlet) worth Rs. 100, and a nose-"ring worth Rs. 100, altogether Rs. 901. As to *Ritbhát*, the *Rit* "(*i.e.*, customary presents, &c.,) of (*i.e.*, according to the custom "of) Nágar Vissá Khambati is truly to be given and taken. As "to the *Pehrawani* (presents of clothes, &c.) to the bridegroom, I "am truly to give a pair of cocoanuts."

But this usage of giving or agreeing to give *palu* to the bride herself (which is nothing else than a kind of rudimentary marriage settlement) is quite a different thing in idea and incidents from the giving of presents to the bride's relations who have the disposal of her in marriage. We find in fact the distinction between the two classes of cases clearly drawn by Manu himself. Though he lays it down (Section 24) "the ceremonies of *Asuras* "must never be performed," and (Section 51) "let no father who "knows the law receive a gratuity, however small, for giving his "daughter in marriage, since the man who through avarice takes a "gratuity for that purpose is a seller of his offspring," yet we find in Section 54: "When money or goods are given to damsels, "whose kinsmen receive them not for their own use, it is no sale; "it is merely a token of courtesy and affection to the brides." What Manu here describes, is a practice to which the giving of *palu* seems to me exactly to correspond.

The next witness Vithaldás Sobherám (who appears to be a leading member of the Nágar Vissá Vania caste) was called on behalf of the applicant, I suppose for the reason that on a

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former occasion he had stated on affidavit that the form of marriage in use in the caste is the *Asura*, for the greater part of his evidence is decidedly unfavourable to the applicant's case. This witness says that he stated in the affidavit in question that the form of marriage was *Asura*, as it is what he understood by *Asura*; but that since he made his affidavit he came to know that different forms of marriage are practised in his caste. In fact, this witness seemed really to know little or nothing as to the essential nature of the different forms of marriage, though he may be a useful witness as to the actual usages of his caste. He says that it is the invariable practice of their caste to give *palu*, but does not know of anything else but *palu* being given; that if he had a daughter he would consider it very disgraceful to receive anything for her marriage, and that the caste would not tolerate such a thing. He says further that it is the custom of the caste that when presents are made to the bride from the father of the bridegroom, and the bride dies without issue, the presents are returned to the quarter from which they came; but that when the bride has presents from her own father, the latter gets them after her death. This was the whole of the evidence (except the bare statement in the affidavit of the applicant himself, a young man of apparently 20 or 22 years old, and very unlikely to be an authority on the subject of the usages of his caste) given on the part of the applicant to show that the marriage of Nathibái with Bhoga Pitambár was in the *Asura* form. On the part of the caveators we have the evidence of Harivalabdás Caliandás (a leading man, though his modesty would not allow him to admit this, of the Nágar Vissá Vania caste) and of Manishanker Madhaorám (an Owdich Brahmin of Surat, who says he has been in the habit for five years past of officiating as priest at the marriages of the caste in question, having before that period done so in other sections of the Vania caste). The first-named witness speaks to the custom prevailing in his caste, that on the occasion of a marriage the bride receives from the bridegroom or his father or relatives *palu*, and that this *palu* is generally deposited with some third person, and is intended as a provision for the maintenance of the wife in case of her husband's death. He states further that this custom is not peculiar to the Nágar Vissá sections of the Vania caste, but that other sections of same

caste have it, and some sections of the Brahmins, as the Motála, Owrishtr, and Tolakiya Brahmins, and that, apart from the *palu*, the father of the bride does not receive anything for himself from the part of the bridegroom, and that, in fact, "in our caste we never sell our daughters." In answer to a question by the Court, the witness said: "If the bride had a mother "and no father, there would be the same objection to the mother "taking a present." Indeed, so scrupulous do they seem to be to avoid any appearance of such a thing that, as the same witness says, "from the betrothal and before the marriage the father of the "bride would not even take food or water at the house of the "bridegroom." He says further: "According to the customs of "our caste, the presents given to the bride by the bridegroom on "a marriage, go back to *his* relations if she dies a widow and "without issue," and that he could give five, seven, or ten instances within his own knowledge of this custom being observed. The Brahman Manishankar states that the marriages among the Nágar Vissá Vania caste, of which he professes to have five years' experience, are not in the *Asura* form, for the reason that in the *Sankalpa*, or formula which he repeats during the ceremony, the words *Brahma Prájápatya* (which are the names of two of the approved forms) occur, and that the form used is, in fact, a kind of mixture of these two forms, namely, the *Bráhmá* and *Prájápatya*. He says further that among the Brahmans, so far as he knows, in all cases, *palus* or presents to the bride are given by the bridegroom or his father, Rs. 300 at least, it may be more, and that in marriages among the Brahmans generally *palus* are given. He says, however, that he is acquainted chiefly with Guzerathi Brahmans, and does not know if, among the Brahmans of the Dekhan, *palus* are given. Now, whether or not it be the fact that Guzerathi or Owdich Brahmans are less highly regarded than Brahmans of the Dekhan (a suggestion, however, which this witness by no means appreciated favourably), yet it appears to me quite out of the question that any usage should prevail among any section of Brahmans which would impress upon their marriages the character of one of the forms not approved for the twice born.

With regard to the form called *Brahma*, we find in Manu, Chapter III., Section 27: "The gift of a daughter clothed only with a

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"single robe to a man learned in the *Vedas*, whom her father "voluntarily and respectfully receives, is the nuptial rite called "*Bráhmá*." Steele in his summary, under the title "Marriage," describes the *Bráhmá* form or kind of marriage in these words: "Where the charges are incurred solely by the girl's father." As to the other form, the name of which, *Prájápatya*, is mentioned by the Brahman Manishankar, we find in Manu: "The "nuptial rite called *Prájápatya* is when the father gives away his "daughter with due honour, saying distinctly, 'may both of you "perform together your civil and religious duties.'" All that Steele says about the form called *Prájápatya* is that it is the form "where the girl is given with the view of obtaining offspring," which, as a definition, is by no means satisfactory, as I should suppose that girls are given in marriage with *that* view, not merely in the form called *Prájápatya*, and among the twice born in India, but in all forms, and all the world over.

On the evidence, the conclusion at which I have arrived is, that, among the Nágar Vissá section of the Vania caste, the form of marriage in use corresponds to one or other of the approved forms, and not to the incidents of that called *Asura*; and that the property left by Nathibái, being, as it appears, composed of the residue of what came to her by inheritance from her deceased husband, must devolve on *his* relatives in blood, and not on her's.

With regard to the case set up by the applicant in his affidavit in reply, that Bhoga Pitámber in his lifetime, and shortly before his death, had given his property to his wife, the only evidence produced on the applicant's part is that of one Mahomed Hajee Ali, timber merchant and contractor. [The learned Judge discussed the evidence as to the gift, and continued]:—In any event, the evidence would not show a gift by Bhoga Pitámber to his wife of his whole property, or of any thing more than the balance remaining to his credit with Mahomed Hajee Ali; and even as to that I am of opinion that the evidence does not show more than this, that Bhoga Pitámber took his wife to his debtor to tell him that on his own death the amount due was to be paid to his widow as his representative, as she, in fact, would be, there being no issue.

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In the above circumstances the application must be dismissed, and with costs. Had the applicant been unaware of the existence or claims of the caveators and other relations of the husband, or had he brought their existence to the attention of the Court when making his application, it might have been a case for not ordering the applicant to pay the caveators' costs. But he was quite aware of their existence and claims, as they were set up directly after Nathibái's death, and it is the duty of all applicants for administration to bring to the attention of the Court the existence of persons who have any fair ground of adverse claim or opposition to such application.

Application dismissed with costs.

[APPELLATE CIVIL JURISDICTION.]

Before Sir M. R. Westropp, Knt., Chief Justice and Mr. Justice Nánábhái Haridás. October 2.

BA'BAN MAYACHA AND OTHERS (PLAINTIFFS, APPELLANTS) *v.* NA'GU SHRAVUCHA AND OTHERS (DEFENDANTS, RESPONDENTS.)*

Jurisdiction—Res judicata—Cause of action—Right of fishing in the sea.

The District Court may, when the defendants reside within its local jurisdiction, try a suit for damages for and restrain by injunction an alleged illegal disturbance of the plaintiff's right to fish and use fishing stakes and nets fixed in the sea below low-water-mark and within three miles of it.

The dismissal, on the ground of want of jurisdiction, by the Civil Court of a suit to eject the defendants from the fishing ground of the plaintiffs, situate below low-water-mark, does not operate as a bar to a subsequent suit by the plaintiffs to recover damages from the defendants for fixing their fishing stakes and nets too near to those of the plaintiffs.

Rights of the Crown and of the public in the waters and the subjacent soil of the sea discussed.

The right of the public to fish in the sea, whether it and its subjacent soil be or be not vested in the Crown, is common, and is not the subject of property.

That right may, in certain portions of the sea, be regulated by local custom.

Members of the public, exercising the common right to fish in the sea, are bound to exercise that right in a fair and reasonable manner, and not so as to impede others from doing the same; and conduct which prevents another from a fair exercise of his equal right, if special injury thereby results to him, is actionable.

* Regular Appeal No. 62 of 1873.

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THE parties to this suit were all fishermen owning stakes and nets fixed off the coast of Salsette, at a distance of between two and three miles from the shore. Previously to 1862 the plaintiffs or their predecessors sued the defendants or their predecessors to eject the defendants from a fishing ground claimed by the plaintiffs and valued at Rs. 6,000, and to recover from the defendants, as damages for trespass on the same, the sum of Rs. 1,500. This suit was dismissed by the Principal Sadar Amin of Thána, on the ground (among others) that the Civil Courts had no jurisdiction over that part of the sea which formed the subject of the suit. The Zilla Judge, in appeal, affirmed the decree of the Lower Court on the grounds—1st, that the existence of private property in any portion of the open sea ought not to be recognized without direct evidence (such as was not there forthcoming) of the appropriation, to the claimants, of such exclusive privileges, either by charter or by statute; and, 2nd, that, assuming private property to exist of the kind and at the place to which the action referred, the Zilla Courts had no jurisdiction in regard to such property. The Sadar Diváni Adálut, in special appeal in 1862, affirmed that decree on the ground only of want of jurisdiction. In 1873 the plaintiffs brought the present suit to recover the sum of Rs. 3,000 as damages sustained by the plaintiffs by reason of the defendants having maliciously and wrongfully erected fishing stakes at a distance of only 120 feet from those of the plaintiffs, whereby they wrongfully disturbed the plaintiffs in the enjoyment of their right to fish, and unjustifiably prevented fish from getting into the nets of the plaintiffs, and to obtain a perpetual injunction to restrain the defendants from so erecting their fishing stakes. The District Judge of Thána held the matter to be *res judicata*, and the present suit accordingly, to be barred by the previous one. The plaintiffs thereupon preferred this regular appeal.

Leith (*Ghanasham Nilkant* with him), for the appellants, argued, 1st, that the matter was not *res judicata*; 2nd, that the Civil Courts had jurisdiction to entertain the suit; 3rd, that an action in the nature of an action on the case—would lie. He cited the following authorities:—*Kalia Hasoocha* v. *Sakool Antoocha*,[1] *Young* v. *Hichens*, *Regina* v. *Kástyá Rámá*,[3] *Green* v. *The London General Omnibus*.

(1) 9. Har. S. D. A. Rep. 276. (2) 6 Q. B. 606.
(3) 8 Bom. H. C. Rep. 63 Cr. Ca.

Company.[1] Woolrych on Waters, pp. 166, 167, 204, 236, 237, *Carrington* v. *Taylor*,[2] *Keeble* v. *Hickeringill*,[3] *Wilkes* v. *The Hungerford Market Company*,[4] *Rose* v. *Groves*,[5] *Davis* v. *Mann*,[6] *The Mayor, &c., of Colchester* v. *Brooke*,[7] *The Stockport Waterworks Company* v. *Potter*,[8] Broom Leg. Max. (4th Ed.), pp. 363, 365, 367, 376, 381. Addison on Torts (3rd Ed.), pp. 7, 8, 9, 10, 11, 139, 140, 168. *Deane* v. *Clayton*,[9] *Dobson* v. *Blackmore*,[10] *Anonymous*,[11] *Smith* v. *Kenrick*,[12] *Ashby* v. *White*,[13] *Embrey* v. *Owen*.[14] 3 Kent Comm. 550. *Benett* v. *Costar*,[15] *Seymour* v. *Courtenay*.[16] 2 Bl. Com. 39. *Holford* v. *Bailey*.[17] Com. Dig. Tit. Trespass. *Bell* v. *The Midland Railway Company*,[18] *Rogers* v. *Rajendro Dutt*,[19] *Chapman* v. *Pickersgill*.[20]

Branson (with whom was *Dhirajlal Mathuradas*), for the respondents, submitted, but without relying strongly on the point, that the matter was *res judicata*. He also argued that the Court had no jurisdiction, and, even if it had, no action would lie, citing *Stevenson* v. *Newnham*,[21] *Rogers* v. *Rajendro Dutt*,[22] *Carrington* v. *Taylor*,[23] *Ward* v. *Cresswell*.[24] 16 Vin. Abr. 354. Piscary B. *Warren* v. *Mathews*.[25] 1 Bac. Abr., Actions on the case C, (p. 76, 6th Ed.). *Bejoy Gobind Bural* v. *Watson*,[26] *Bhooyah Okhoy* v. *Rajah Gujendro*,[27] *Green* v. *The London General Omnibus Company*,[28] *Wilkes* v. *The Hungerford Market Company*,[29] *Rose* v. *Groves*,[30] *Ibbotson* v. *Peat*,[31] *Deane* v. *Clayton*,[32] *Dobson* v. *Blackmore*,[33] *Young* v. *Hichens*.[34]

(1) 29 L. J. C. P. 13.
(2) 11 East 571.
(3) 11 East 574.
(4) 2 Bing. N. C. 281.
(5) 12 L. J. C. P. 251.
(6) 12 L. J. Ex. 10.
(7) 15 L. J. Q. B. 173.
(8) 31 L. J. Ex. 9.
(9) 7 Taunt. 489.
(10) 9 Q. B. 991.
(11) 1 Camp. 517 *in notis*.
(12) 7 C. B. 515.
(13) 2 Ld. Raym. 938 : S. C. 1 Sm. L. C. 227 (6th Ed.)
(14) 20 L. J. Ex. 212.
(15) 8 Taunt. 183.
(16) 5 Burr. 2815.
(17) 13 Q. B. 426.
(18) 30 L. J. C. P. 273.
(19) 13 Moore P. C. 209.
(20) 2 Wils. 145.
(21) 13 C. B. 285.
(22) 13 Moore P. C. 209.
(23) 11 East 571.
(24) Willes Rep. 265.
(25) 6 Mod. 73.
(26) Calc. S. D. A. Rep. for 1859, p. 629.
(27) 18 Calc. W. R. 142 Civ. Rul.
(28) 29 L. J. C. P. 13.
(29) 2 Bing. N. C. 281.
(30) 12 L. J. C. P. 251; S. C. 5 M. and G. 613.
(31) 34 L. J. Ex. 118.
(32) 7 Taunt. 489.
(33) 9 Q. B. 991.
(34) 6 Q. B. 606.

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Leith in reply cited *Carter* v. *Murcot*,(1) *Webb* v. *Bird*,(2) *Stevenson* v. *Newnham*.(3) Broom Leg. Max. (5th Ed.) p. 325, *Regina* v. *Pratt*,(4) *Ibbotson* v. *Peat*,(5) *Chasemore* v. *Richards*,(6) *Bagram* v. *Moses*,(7) *Penn* v. *Lord Baltimore*,(8) *Chintaman Náráyan* v. *Madharav Venkatesh*.(9)

NANABHAI HARIDAS, J.:—This is an appeal against a judgment of the District Judge of Thana. The appellants (plaintiffs below) allege in their plaint that they and the respondents are fishermen; that, in accordance with the custom of their trade, they have been for years erecting their fishing stakes annually opposite to the village of Yerangal, at a distance of between two and three miles from the coast, those of the respondents being to the north of, and about 600 feet distant from, their own; that in the month of March 1872, the respondents, in addition to their customary stakes to the north, *maliciously and wrongfully* erected other fishing stakes to the south, at a distance of only 120 feet from those of the appellants, and that thereby they wrongfully disturbed the latter in the enjoyment of their right to fish, and unjustifiably prevented fish from getting into their nets, thus causing them considerable pecuniary loss. They, therefore, claim from the respondents Rs. 3,000 as damages in respect of such their act, and also pray for a perpetual injunction to restrain the latter from repeating it.

In their written statement the respondents (defendants below) urge that the Court has no jurisdiction to entertain this suit; that the matter complained of is *res judicata*, having already formed the subject of a previous suit that went up to, and was disposed of by, the late Sadr Divani Adalat(10); and also that the suit is barred by the law of limitation. They further deny the custom alleged in the plaint; deny that they have maliciously or wrongfully done the act complained of; aver that they are entitled to fish, and for that purpose to erect their fishing stakes and nets in any part of the sea; deny that the appellants have suffer-

(1) 4 Burr. 2163.
(2) 10 C. B. N. S. 268.
(3) 13 C. B. 285.
(4) 4 El. & Bl. 860.
(5) 34 L. J. Ex 118.
(6) 26 L. J. Ex. 393.
(7) 1 Hyde 284.
(8) 1 Ves. 444; S. C. 2. Wh. & Tud. (3rd Ed.) 837.
(9) 6 Bom. H. C. Rep. 29 A. C. J.
(10) 9 Harr. S. D. A. Rep. 276.

ed any injury; and, lastly, urge that the appellants, having no exclusive right to fish in any part of the sea, are not entitled to the injunction prayed for.

The District Judge accordingly laid down the following issues :—

1. Whether the Court has jurisdiction to try the suit ?
2. Whether the judgment in the previous suit prevents this suit being heard ?
3. Whether this suit is barred by the law of limitation ?
4. Whether the custom alleged by the plaintiffs exists ? and
5. Whether the defendants have caused any injury to the plaintiffs, and, if so, what damages should be awarded ?

He held that, under Section 5, Act VIII. of 1859, the Court had jurisdiction to try the suit, the defendants dwelling within its jurisdiction; but that the suit itself was barred by the previous one, and he accordingly rejected the claim without deciding the other issues.

The plaintiffs have, therefore, appealed to us on the grounds that the District Judge was wrong in holding this suit barred by the previous one, and that he ought to have taken evidence and decided the case on its merits.

The defendants have, on the other hand, filed an objection, under Section 348, Civil Procedure Code, "that the Civil Court had no jurisdiction to entertain this claim."

We have accordingly to determine in this appeal : 1st, whether the District Judge had jurisdiction to entertain the suit at all ; and, 2ndly, if so, whether he was right in holding it barred by the previous suit.

Although the question of jurisdiction was thus expressly raised in the objection filed by the respondents, as stated above, they did not appear to us seriously to rely upon it when the appeal was argued before us; and it is impossible to hold that the District Judge had not jurisdiction to entertain this suit. It is not a suit "for land or other immoveable property," but for damages for an

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alleged illegal act; and we have it expressly found here upon their own admission that "the defendants at the time of the commencement of the suit dwelt within the jurisdiction of the Court"—a fact not controverted before us. We must, therefore, regard their objection as deserving of no further notice, and proceed to consider the plaintiffs' appeal.

To determine whether this suit is barred by the previous one or not, it is necessary to see what that suit was about, and what the contention and ultimate decision in it were, assuming the parties in both to be substantially the same. In the former suit, which terminated in S. A. No. 4311, [1] the present plaintiffs, or those whom they represent, sued the present defendants, or those whom they represent, to eject them from a fishing ground, whose identity with the site of the present fishing stakes is not disputed, and to recover damages from them for an alleged trespass upon it, the plaintiffs claiming it as exclusively their own under an alleged grant from the villagers of Yerangal.

The defendants denied that the ground was plaintiffs', and asserted that they themselves had been fishing there from time immemorial.

The Principal Sadr Amin of Thana, as also the Zillah Judge in appeal, dismissed the claim on the ground *(inter alia)* that the Civil Court had no jurisdiction; the immoveable property, the subject of the suit, being situated below low-water mark and, therefore, as they held, beyond the limits of their jurisdiction.

This decision was in special appeal upheld, upon the same ground, by the late Sadr Divani Adalat on the 26th March 1862.

It is not necessary for us to express any opinion in this case as to the correctness of that decision; but it is clear to our minds that it cannot be taken to have disposed of any question except that of the Civil Court's jurisdiction to entertain the suit. The Sadr Adalat did not proceed to decide the suit upon the merits at all; and, although the Principal Sadr Amin and the Zillah Judge had both expressed their views upon the merits adversely to the plaintiffs, still, as they held that they had no jurisdiction to entertain the suit, and as the suit was ultimately disposed of in special

[1] 9 Harr. S. D. A. Rep. 276.

appeal on that ground alone, the cause of action in it cannot be regarded as having been "heard and determined by a Court of competent jurisdiction." Besides, in the present suit, the thing complained of is different from that in the former. The present cause of action, as alleged, is that in March 1872 the defendants fixed their fishing stakes and nets too near the plaintiffs', whereby the plaintiffs have been deprived of the fish they would otherwise have caught. This cause of action then, if it be one, was certainly not, and could not possibly have been, "heard and determined" by the late Sadr Court in 1862; and Section 2 of the Civil Procedure Code accordingly does not seem to us to preclude the District Judge from taking cognizance of the present suit in respect of an alleged illegal act of the defendants subsequent in point of time to the decision in the previous one.

Such being the case, we have no alternative but to remand the suit, unless it be clear that the facts alleged in the plaint constitute no cause of action at all. It has been strongly urged in argument here that they do not, because, if true, they only showed that the defendants had done what they had a perfect right to do, namely, to follow their own trade; and that the sea being a *res publica*, no one could lay claim to an exclusive right to or property in any portion of it. As regards this latter branch of the contention, however, it is scarcely necessary for us to do more than observe that, whatever the plaintiffs may have claimed in the previous suit, they have not in the present one claimed any exclusive right to or property in the sea itself; and that hence whether such right or property can, under any circumstances, be claimed or not, is a question upon which we are not called upon to express any opinion. The plaintiffs distinctly disclaim here any exclusive right through their counsel Mr. Leith. He says: "We only complain here of the too great proximity of the defendants' nets.....We complain of the new stakes, 120 feet to the south of ours, placed in March 1872, and not of those to the north, which are 600 feet distant from ours. *We claim no exclusive right. We only claim to enjoy the right which is common to all the public.*" The only question, therefore, which remains for us to decide is whether, taking all the facts as stated in the plaint, they constitute any cause of action, or whether, as urged

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on behalf of the defendants, they only show that what is complained of is what the defendants are entitled to do, and that, therefore, though this may be a case of damage, it is not one in which any injury or legal wrong has been caused.

After alleging in paragraph 2 of their plaint a 'custom' in accordance with which the defendants, as they allege, have hitherto planted their stakes at a distance of 600 feet from their own, the plaintiffs in paragraph 3 state that "in the month of March last" the defendants "*wrongfully and maliciously*, and with intent to damnify the plaintiffs," erected the fishing stakes and nets complained of at a distance from their own of "not more than 120 feet or thereabouts," whereby "the defendants have wilfully disturbed and caused an *unreasonable and unnecessary* obstruction to the plaintiffs' right of fishing in the said waters, and *wrongfully and unjustifiably* prevented fish from coming into the power of the plaintiffs, as they would otherwise have done; and whereby the defendants also have materially interfered with and injured the said trade of the plaintiffs, and caused the plaintiffs considerable pecuniary loss and damage."

The plaintiffs may not be able to prove all that they have thus alleged; but we are not prepared to say that no cause of action whatever is disclosed in the plaint itself. Our reasons for this opinion will be dealt with by the Chief Justice in the judgment he will presently deliver.

The decree of the District Judge must, therefore, be reversed, and the case remanded for decision on the merits.

WESTROPP, C.J.:—At the other side of India several cases relating to private fisheries, most frequently described as Jalkars (Julkurs), appear in the reports.[1] Excepting, however, the information derivable from the previous litigation between the inhabitants of the villages of Malavni and Manori, [2] who once again encounter each other in the present suit, there is an absolute dearth of authority in our Indian law books with respect to fisheries in the open sea.

(1) 1 Calc. S. D. A. Rep. 221; 2 Id. 51; 1 Calc. W. R. 79, 88, 116; 5 Id. 115; 6 Id. 17, 41, 99; 7 Id. 405; 11 Id. 374; 18 Id. 460; 20 Id. 95, 117; 24 Id. 200, 265; Calc. W. R. (1864) 63, 243, 267, 275; Marshall 334; 12 Beng. L. R. 210 (P. C.).

(2) *Kalia* v. *Hasoocha*, 9 Harrington S. D. A. Rep. 276; *Regina* v. *Kástyá Rámá*, 8 Bom. H. C. R. 63 Cr. Ca.

The Roman Law may be gathered from the following passages:— Ulpian.—"Et quidem mare *commune* omnium est, et litora, sicuti aer: et est sæpissume rescriptum non posse quem piscari prohibere * * * * * * In lacu tamen qui mei dominii est, utique piscari aliquem prohibere possum."(1) Celsus.—"Litora in quæ populus Romanus imperium habet, populi Romani esse arbitror. Maris *communem* usum omnibus hominibus ut aeris: jactasque in id pilas, ejus esse qui jecerit: sed id concedendum non esse, is deterior litoris marisve usus eo modo futurus sit."(2) With reference to what Celsus has here said as to the 'litora,' the Commentator, probably Gothofredus, observes:—"Ideoque gentes in illa litora descendentes populus Romanus prohibere potest: suos cives non potest." On the same portion of the passage Mr. Sandars aptly remarks that "if we are to bring this opinion of Celsus into harmony with the opinions of other jurists, we must understand 'populi Romani esse' to mean 'are subject to the guardianship of the Roman people'." In the Institutes (3) it is said:— "Quædam enim naturali jure *communia* sunt omnium, quædam publica, quædam universitatis, quædam nullius, pleraque singulorum, quæ ex variis causis cuique adquiruntur, sicut ex subjectis apparebit. 1, Et quidem naturali jure *communia* sunt omnium hæc: aer, aqua profluens, et mare et per litora maris. Nemo igitur ad litus maris accedere prohibetur;(4) dum tamen a villis et monumentis et ædificiis abstineat, quia non sunt juris gentium sicut est mare. 2, Flumina autem omnia et portus *publica* sunt. Ideoque jus piscandi omnibus *commune* est in portu fluminibusque. 3, Est autem litus maris quatenus hybernus fluctus maximus excurrit. 4, Riparum quoque usus *publicus* est jure gentium, sicut ipsius fluminis. Itaque navem ad eas adplicare, funes arboribus ibi natis religare, onus aliquod in his reponere, cuilibet liberum est, sicut per ipsum flumen navigare. Sed proprietas earum illorum est quorum prædiis hærent. Qua de causa arbores quoque in iisdem natæ eorundem sunt. 5, Litorum quoque usus *publicus* est, et juris gentium, sicut et ipsius maris. Et ob id cuilibet liberum est casam ibi ponere, in quam se recipiat: sicut retia siccare, et ex mari deducere. Proprietas autem eorum potest intelligi

(1) Dig. Lib. XLVII, Tit. X., *l.* 13; see also by Ulpian Dig. L. VIII., Tit. IV., *l.* 13, and the Commentary thereon.

(2) Dig. L. XLIII., Tit. VIII., *l.* 3.

(3) Inst. Lib. II., Tit. 1.

(4) Some here add "piscandi causa."

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nullius esse : sed ejusdem juris esse, cujus et mare, et quæ subjacet mari, terra vel arena. 6, Universitatis sunt, non singulorum, veluti quæ in civitatibus sunt, theatra, stadia, et si quæ alia sunt communia civitatum."

Amongst several passages quoted by Grotius[1] from the classic poets to show how deeply imbued the Roman mind was with the doctrine of the civilians contained in the above extracts, is the following from Ovid, Met. 6 :—

> "Quid prohibetis aquis ? Usus communis aquarum est.
> Nec solem proprium Natura, nec aëra fecit,
> Nec tenues undas. In publica munera veni."

Grotius addressed his 'Mare Liberum' 'ad principes populosque liberos orbis Christiani' against the Portuguese claim to a monopoly of the Indian Seas, and denied that alleged primary discovery, the grant of the Pope (Alexander VI.), or any other pretence could confer upon the Portuguese a good title against that of the world at large, resting upon the Law of Nature and of Nations and the Civil Law, to a common enjoyment of the high seas for purposes of navigation and fishing.[2] He denied that, generally speaking,[3] the sea or its subjacent soil could be the subject of property or dominion. He also noticed the distinction taken in the passage above quoted from the Institutes between what is common and what is public—a distinction repudiated by Noodt[4] and by the Commentator in the London translation of Grotius' De Jure Belli et Pacis, published A.D. 1738, Bk. II, Ch. III, p. 162, note 5. Bracton[5] takes the distinction, but differently : "Nota hic differentiam inter publicum et commune. Publica autem ita accipiuntur quæ sunt omnium populorum—quæ spectant ad usum hominum tantum—communia vero dici poterunt aliquando quæ sunt omnium animantium," but I shall not pursue those distinctions. It will be sufficient for present purposes if we arrive at the conclusion that the right of fishing off Yerangal[6]

(1) Mare Liberum, C. 5 ; see also Selden's Mare Clausum, Bk. I., ch. II., p. 6., transl. by J. H.; London, 1663.

(2) See especially his 5th chapter of the Mare Liberum, and his treatise De Jure Belli et Pacis, Bk. II., ch. III., pl. 9.

(3) As to exceptions, *vide* De Jure Belli et Pacis, Bk.II.,ch. III., pl. 10. Ulpian Dig. XLIII., Tit. 8, *l.* 3.

(4) Probabilia Juris. Lib. I., ch. VII., VIII.

(5) Lib. I., ch. XII, pl. 6.

(6) Called 'Yergheel' in 9 Harrington S. D. A. Rep. 278, *et seq.*

is open to the public of British India; hence it is not essential to consider either the claims of the human race at large or of all animated beings.

A considerable extent (1) was claimed by Selden in his Mare Clausum (which controverted certain of the doctrines of Grotius) for the British Seas (or as they are usually called the Four Seas),(2) and an imperious dominion over them, on behalf of the King of Great Britain and Ireland. His arguments have been impugned by Bynkershoek and other foreign jurists, and have received only a qualified support from Sir Philip Meadows in his observations concerning the Dominion and Sovereignty of the Seas published in 1689.(3) Selden's contention was that the seas which washed the shores of Great Britain and Ireland were subject to the sovereignty of that kingdom even so far as the Norwegian coast. This pretension Mr. Reddie(4) and Sir R. Phillimore(5) pronounce to be extravagant, and since Selden's time it does not appear to have been insisted upon. Grotius, while denying the right of any nation to monopolize a sea, admitted that, over parts of a sea adjacent to a State, it might acquire a certain "imperium," which acquisition, he said, might be effected like that of other "imperia" as he had previously stated, "ratione personarum et ratione territorii." He proceeded—"Ratione personarum ut si classis, qui maritimus est exercitus, aliquo in loco maris se habeat: ratione territorii quatenus ex terra cogi possunt, qui in proxima maris parte versantur, nec minus, quam si in ipsa terra reperirentur."(6) This territorial "imperium" or jurisdiction was by Bynkershoek(7) asserted to terminate "ubi finitur armorum vis" or "quousque tormenta exploduntur." Some authors (not many) have assigned to it a wider scope; but the great majority of writers on International Law, from his time down to the present day, adopting his view, have maintained that the territorial jurisdiction extends over the sea adjacent to the land so far as a cannon shot fired from low-water mark would reach—a distance which most of

(1) Mare Clausum, Bk. II., ch. I., p. 181 *et seq.* of Eng. trans. by J. H.; London, 1663.

(2) As to the Four Seas, *vide* Hargrave's Note to Co. Lit. 107a, 107b.

(3) See Butler's Note to Co. Lit. 261a, and Thomas' Co. Lit., Vol. I, pp. 46, 47, *in notis.*

(4) 1 International Law, ch. VI., pp. 218, 220, *et seq.* (2nd Ed.)

(5) Marit. Int. Law, Vol. I., p. 215.

(6) De Jure Belli et Pacis, Lib. II., c. 3., s. 13., pl. 2.

(7) De Dom. Mar., ch. II., p. 127 (Ed. of 1767).

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them concur in fixing at three geographical miles (*i. e.*, a marine league).[1] What the nature of the authority over that maritime territory is, and whether such territory can be regarded as the property of the State to which it is adjacent, are questions upon which internationalists are not unanimous.[2] In the recent edition by Mr. Amos of the treatise of Mr. Manning, p. 119, the subject is treated thus:—"For some limited purposes a special right of jurisdiction, and even (for a few definite purposes) of dominion, is conceded to a State in respect of the part of the ocean immediately adjoining its own coast line. The purposes for which this jurisdiction and dominion have been recognized are—1, *The regulation of fisheries;* 2, the prevention of frauds on customs laws; 3, the exaction of harbour and light-house dues; and 4, the protection of the territory from violation in time of war between other States. The distance from the coast line to which this qualified privilege extends has been variously measured—the most prevalent distance being that of a cannon shot or of a marine league from the shore." Vattel [3] admits that "the various uses of the sea near the coast render it very susceptible of property. It furnishes fish, shells, &c., &c. Now in all these respects its use is not inexhaustible; wherefore the nation, to whom the coasts belong, may appropriate to themselves, and convert to their own profit, an advantage which nature has so placed within their reach as to enable them conveniently to take possession of it, in the same manner as they possessed themselves of the dominion of the land they inhabit." Hautefeuille [4] treats the sovereignty of the riparian state over this maritime territory to be as complete as over the land, and that it is necessary for the welfare of its subjects that the fisheries should be protected and regulated; and contends that the ships of other nations may be excluded from this littoral sea. Ortolan denies that the riparian state has any right of property in that sea, or, at least, any such right of property as would imply authority to prohibit

(1) 1 Kent Com. pp. 31, 32, Ed. of 1860; Wheaton Int. Law 320, *et seq.*, of Lawrence's Ed. of 1864; Vattel, Bk. I., ch. XXIII., pl. 289; Bonfils., p. 319, Paris—Ed. of 1865; 1 Reddie Mar. Int. L. 16; Ortolan Diplomatie de la Mer. Liv. II, ch. VIII., p. 158 of the Paris Ed. of 1864; Manning, 1st Ed., ch. XIII, p. 385; 1 Phillimore Int. L., page 235, pl. CXCVIII., 2nd Ed., and many others.—See 7 Bombay H. C. Rep. Cr. Ca. 104.

(2) See *Reg.* v. *Keyn*, L. R. 2 Ex. D. 63 (*Reporter's Note*).

(3) Bk. I., ch. XXIII., pl. 287.

(4) Des Droits, &c., des nations neutres, pp. 82, 287, *et seq.* 297; Hist. de Droit Marit., 197.

the ships of other States from navigating it.(1) He admits, however, that one of the main objects of the *mer territoriale* is "pour protéger la pêche côtiére qui, á moins de conventions spéciales, doit être reservée aux seuls nationaux."(2) The right of free navigation appears to have been recognized by English Courts—*Gana* v. *The Free Fishers of Whitstable*,(3) *The Twee Gebroeders*,(4) *The Saxonia*.(5) There would not, however, seem to be any impossibility in the existence of a right of property in such a sea being vested in the riparian state subject to a right of free navigation by the ships of other states for commercial purposes. Mr. Wheaton,(6) speaking of this belt of littoral sea "within the distance of a marine league, or as far as a cannon shot will reach from the shore," says:—"The physical power of exercising an exclusive property and jurisdiction, and of excluding the action of other nations within these limits, exists to a certain degree; but the moral power may, perhaps, seem to extend no further than to exclude the action of other nations to the injury of the State by which this right is claimed. It is upon this ground that is founded the acknowledged immunity of a neutral State from the exercise of acts of hostility by one belligerent power against another, within those limits. This claim has, however, been sometimes extended to exclude other nations from the innocent use of the waters washing the shores of a particular State in peace and in war; as, for example, for the purpose of participating in the fishery, which is generally appropriated to the subjects of the State within that distance of the coasts. This exclusive claim is sanctioned both by usage and convention, and must be considered as forming a part of the positive law of nations." In a treaty between Great Britian and the United States, with respect to the fishery off Newfoundland,(7) and in a treaty between France and Great Britain,(8) the exclusive right of the contracting riparian states to fish within the territorial zone of three miles from their respective shores, has been recognized. Massé, in his Droit Commercial en rapport avec le Droit des Gens, admits the existence of a property in that zone burdened

(1) Dipl. de lá Mer. Vol. I., Liv. 2, c. 8, pp. 156, 159 (Ed. of 1864).

(2) Id. p. 160.

(3) 11 H. of Lds. 192.

(4) 3 C. Rob. 336.

(5) 15 Moore P. C. 262.

(6) Int. Law, Ed. by Lawrence, 1864, p. 343.

(7) Phil. 1 Int. Law, p. 232, pl. CXCV (2nd Ed.)

(8) 1 Ort. Dipl. de la Mer., Liv. II., ch. VIII, p. 160, note (Ed. of 1864).

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(grévée), however, with "une servitude naturelle au profit de tous les peuples navigateurs." He adds this important qualification of that remark—"cependant il en est autrement pour la pêche, qui ne peut être faite que par les habitants du littoral." And Sir John Nicholl, in *Rex* v. *Forty-Nine Casks of Brandy*,(1) said: "As between nation and nation, the territorial right may, by a sort of tacit understanding, be extended to three miles, but that rests upon different principles, viz., that their own subjects shall not be disturbed in their fishing, and particularly in their coasting trade and communications between place and place during war," &c. To much the same effect are the observations of Bynkershoek in the 4th chapter of his treatise De Dominio Maris. The territorial maritime belt has been adopted by Lord Stowell in *The Twee Gebroeders*,(2) a prize case, and by Wood, V. C., in *General Iron Screw Co.* v. *Schurmanns*.(3) In *The Leda*,(4) and *The Annapolis*,(5) Dr. Lushington recognized the right of Parliament to legislate for that territory.(6) For instances in which that right has been exercised, I may refer to 59 Geo. III., c. 38, s. 2, affirming the right of British subjects to fish and dry fish within three miles of the coast of British America; to Acts relating to the customs 3 and 4 W. IV., c. 53, s. 2; 16 and 17 Vic., c. 101, s. 212; and the Foreign Enlistment Act, 33 and 34 Vic., c. 90, ss. 2, 14; and The Merchant Shipping Act, 17 and 18 Vic., c. 104, s. 527. Speaking of the three-mile belt, with reference to the right of fishing, Lord Wensleydale in *Gammel* v. *The Commissioners of Woods and Forests*(7) said that it, "by the acknowledged law of nations, belongs to the coast of the country—that which is under the dominion by being within cannon range and so capable of being kept in perpetual possession." In *Rolet* v. *The Queen*(8) the right of a colony to legislate for its marine territory to that extent was admitted.

British authorties have laid it down that the British seas, to their geographical extent, whatsoever it may be, both as regards the land or soil beneath them, and the water, are vested in the Sovereign. It has been said that 'the sea is the King's proper

(1) 3 Hag. Adm. Rep. 289, 290.
(2) 3 C. Rob. 162.
(3) J. and H. 180.
(4) Sw. Adm. Rep. 40.
(5) Lush. Adm. Rep. 295, 306.
(6) See also the opinions of the Law Officers mentioned in *Reg.* v. *Elmstone*, 7 Bom. H. C. Rep. 104.
(7) 3 Macq. 465.
(8) L. R. 1 P. C. 198.

inheritance,'[1] and he is lord 'of the Great Waste,'[2] *tam aquae quam soli*. This includes not only the open sea, but all creeks, arms of the sea, havens, ports, and tide rivers so far as the reach of the tide, around the coast of the United Kingdom. Lord Chief Justice Hale, in his treatise[3] De Jure Maris, divides the King's right into two branches, viz. :—1, "His right of jurisdiction which he ordinarily exerciseth by his admiral," and, 2, "His right of propriety or ownership," and deals with the latter thus :—"The King's right of propriety or ownership in the sea and soil thereof is evidenced principally in these things that follow. 1st—The right of fishing in this sea and the creeks and arms thereof is originally lodged in the Crown, as the right of depasturing is originally lodged in the owner of the waste, whereof he is lord, or as the right of fishing belongs to him that is the owner of a private or inland river." Although theoretically this may be so, what follows shows that the British Law was as little forgetful of the interests of the public as the Roman Law. Lord Chief Justice Hale, after making references in support of what he had said, proceeds thus:—"But though the king is the owner of this Great Waste, and, as a consequent of his propriety, hath the primary right of fishing in the sea and the creeks and arms thereof ; yet the common people of England have regularly a liberty of fishing in the sea or creeks or arms thereof, as a public common of piscary, and may not without injury to their right be restrained of it, unless in such places or creeks or navigable rivers where either the king or some particular subject hath gained a propriety exclusive of that common liberty."[4]

Speaking of this right of the public to fish in the sea and its arms, Schultes[5] says :—"As a public right belonging to the people, it *primâ facie* vests in the Crown, but such legal investment does not diminish the right or counteract its exertion."

(1) The case of the Royal Fishery of the Bann, Sir John Davis, Rep. 56.

(2) Sir M. Hale's De Jure Maris, ch. IV, Hargrave's Law Tracts, pp. 10 and 11 ; Hall's Sea Shore (Ed. of 1875), pp. 2, 3, and App. pp. VII, VIII.

(3) Sir M. Hale's authorship of this work has been disputed by Serjeant Merewether in his speech in *Att. Gen.* v. *The City of London* (Hall's Sea Shore, App. p. LXXV). See Jerwood's Dissertation, pp. 32, 45 ; Phear, p. 47, note (m) ; Hall's Sea Shore, p. 5, note (g), Ed. of 1875.

(4) De Jure Maris, ch. IV, Hargrave's Law Tracts, pp. 10, 11 ; Hall's Sea Shore, App. pp. VII, VIII.

(5) Aquatic Rights, p. 15.

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As to exceptional cases of private rights in the sea and its soil, Lord Chief Justice Hale further observes[1] that, "although the king hath *primâ facie* this right in the arms and creeks of the sea *communi jure*, and in common presumption, yet a subject may have such a right" either by grant or prescription[2] (which latter, "in the eye of the law, always presupposes a grant,"[3] although in fact none such may have been made). Lord Chief Justice Hale continues:—"The king may grant fishing within a creek of the sea, *or in some known precinct that hath known bounds though within the main sea.*[4] He may also grant that very interest itself, viz., a navigable river, that is an arm of the sea, the water and soil thereof. He may also grant a manor *cum litore maris eidem adjacente;* and the shore itself will pass, though in gross and not parcel of the manor.—He may also grant a manor or land contiguous to the sea, *unâ cum maritimis incrementis*, and that will pass that *jus alluvionis* whereof before."[5] As to fishing he observes:—"A subject may, by prescription, have the interest of fishing in an arm of the sea, in a creek or port of the sea, or in a certain precinct or extent lying within the sea: and these not only free fishing but several fishing."[6] The burden of proof lies on the subject asserting that right.[7]

It should here be observed that, although Lord Chief Justice Hale used the expression "may grant," he must be understood as meaning that the King might, previously to Magna Charta (temp. Henry II), have granted a several fishery in a part or branch of the sea, or in tidal navigable rivers. Since Magna Charta he cannot in England or Ireland by grant thus abridge the public right. In *Blundell* v. *Caterall*,[8] Bayley, J., said:—"Many of the King's rights are, to a certain extent, for the benefit of his subjects, and that is the case as to the sea, in which all his subjects

(1) De Jure Maris, Hargrave L. T. 17; Hall's Sea Shore, App. XIV.

(2) Mr. Hall (Sea Shore, 2nd Ed., pp. 16 to 40) argues against the acquisition of title by prescription to the sea-shore or bottom of the sea. That it may be so gained is, however, established law.—Vide *Benest* v. *Pipon*, 1 Knapp P. C. C. 60; De Jure Maris, ch. V, Hargrave L. T., p. 18 *et seq.*; Hall's Sea Shore, App. p. XV *et seq.*; Butler's note to Co. Lit. 261a.

(3) Butler's note to Co. Lit. 261a.

(4) See 4 B. & C. 485, 6 C. B. 881, and Hall's Sea Shore 89, 2nd Ed.; *Carter* v. *Murcott*, 4 Burr. 2162.

(5) De Jure Maris, Hargrave L. T. 17, 18, 19; Hall's Sea Shore, App. XIV, XV, XVII.

(6) De Jure Maris, Hargrave L. T. 18; Hall's Sea Shore, App. XV, 2nd Ed.

(7) Lord Fitz Walter's case, 1 Mod. 105, 106.

(8) 5 B. and Ald. 304.

have the right of navigation, and of fishing, and it is so in highways, along which all his subjects have the right of passage, and the King can make no modern grants in derogation of those rights." And in *Dickens* v. *Shaw*,(1) the same learned Judge, speaking of the sea-shore between high and low-water-mark, said :—"The right of the Crown is not, in general, for any beneficial interest to itself, but for securing to the public certain privileges in the spot between high and low-water-mark." And Willes, J., in giving to the House of Lords in *Malcolmson* v. *O'Dea*(2) the unanimous opinion of the Judges, said:—"The soil of navigable rivers like the Shannon, so far as the tide flows and reflows, is *primâ facie* in the Crown, and the right of fishery *primâ facie* in the public. But for Magna Charta, the Crown could by its prerogative exclude the public from such *primâ facie* right, and grant the exclusive right of fishery to a private individual, either together with or distinct from the soil. And the Great Charter left untouched all fisheries which were made several, to the exclusion of the public, by act of the Crown not later than the reign of Henry II."

Such "a certain precinct," in which a subject may acquire a right of property or of fishing or of both, Lord Chief Justice Hale describes as "a *districtus maris*, a place in the sea between such points or a particular part contiguous to the shore, or of a port or creek or arm of the sea."(3) "These may be possessed by a subject, and prescribed in point of interest both of the water and the soil itself covered with the water within such a precinct; for these are manoriable, and may be entirely possessed by a subject."(4) Such portions of the sea as may thus become private property, or in which there may be a private right of fishery, *generally* no doubt, are situated *inter fauces terræ*, but it is not to be inferred from the observations of Lord Chief Justice Hale that this must *necessarily* be so.

(1) Hall's Sea Shore, App., p. LXIV (2nd Ed.).

(2) 10 Ho. of Lds. 593, 618. See also *Duke of Devonshire* v. *Hodnett*, 1 Hud. and Br. 322, and the remarks of Lord St. Leonards in the *Lord Advocate* v. *Hamilton*, 1 Macqueen (H. L.) 46, quoted *infra*.

(3) De Jure Maris, ch. VI, Hargrave L. T., p. 31, and see p. 36; Hall's Sea Shore, App., pp. XXIX, XXX, and see p. XXXV.

(4) Ibid.

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Whether the locality, the proper mode of fishing in which is now in dispute between the villagers of Malavni and Manori, is such a *districtus maris* as might be the site of a private fishery, was a question entertained by Mr. C. Erskine as Zillah Judge of Thana in the former civil suit between these villagers, and he seemed to be of opinion in the negative.(1) This suit is so differently framed from the suit before him that, as will presently be seen, it is unnecessary for us to give any opinion upon that question.

Erle, C. J., in the *Whitstable Fishers* v. *Gann*(2) said :—"The soil of the sea-shore to the extent of three miles from the beach is vested in the Crown." Lord Chelmsford said that it was so vested subject to the right of navigation.(3) The Stat. 21 and 22 Vic., c. 109, passed in 1858 and founded upon an award of Sir John Patteson upon questions between the Crown and the Prince of Wales as to the right to mines and minerals "between high and low-water-marks within the County of Cornwall, and under the estuaries and tidal rivers within the same county, and under the open sea below low-water-mark, adjacent to, but not in or part of the same county," is deserving of consideration. Sir John Patteson decided, as appears from the preamble of the Statute, "first, that the right to all mines and minerals lying under the sea-shore between high and low-water-marks within the said County of Cornwall, and under the estuaries and tidal rivers and other places even below low-water-mark, being in and part of the said county, is vested in His Royal Highness as part of the soil and territorial possessions of the Duchy of Cornwall," and, "secondly," which is to be especially noted, "that the right to all minerals lying below low-water-mark under the open sea, adjacent to, but not being part of the County of Cornwall, is vested in Her Majesty the Queen in right of her Crown, although such minerals may or might be won by workings commenced above low-water-mark and extended below it." The second section of the statute accordingly enacted and declared that "all mines and minerals lying below low-water-mark under the open sea, adjacent to, but not being part of the County of

(1) 9 Harrington S. D. A., Rep. p. 281.

(2) 11 C. B. N. S. 387, 413; S. C. 13 C. B. N. S. 853.

(3) 11 Ho. of Lds. 192, 217, 218.

Cornwall, are, as between the Queen's Majesty in right of her Crown on the one hand, and H. R. H. Albert Edward, Prince of Wales and Duke of Cornwall, in right of his Duchy of Cornwall on the other hand, vested in Her Majesty the Queen in right of her Crown as part of the soil and territorial possessions of the Crown."

Whether the Sovereign is entitled to dominion over or ownership in the seas surrounding British India and their subjacent soil, to any extent *beyond* the territorial jurisdiction of three geographical miles from low-water-mark, is a question which we need not consider. The tort, of which the present plaintiffs complain, is, in the plaint, alleged to have been perpetrated at a distance of more than two and less than three miles from the shore, and is, therefore, within the territorial limit of jurisdiction assigned to States by internationalists. Howsoever great or small may be the value of the analogy, it may, perhaps, be well to observe that as in Great Britain the Sovereign, as Lord of the Waste, is said to be Lord also of the British territorial waters and the soil beneath them, so in India we find that, as a general rule, its waste lands are vested in the Ruling Power. The principal authorities for that proposition have been quoted or mentioned in the Kanara Land Case.(1) In Bombay Regulations I of 1808, Section 59, and XVII of 1827, Section 7, the *primâ facie* title of Government to deal with waste and uncultivated lands is recognized. A more ambitious assertion of the proprietary right of the State in lands is to be found in the preamble of Bombay Regulation III of 1814, if it be read in the sense which primarily it would seem to bear. That preamble alleges that "the Ruling Power of the provinces now subject to the Government of Bombay has, in conformity to the ancient usages of the country, reserved to itself, and has exercised the actual proprietary right of *lands of every description*, and that, consistently with that principle, all alienations of land, except by the consent and authority of the Ruling Power, are violations of that right"—a statement directly at variance with a despatch of the Court of

(1) *Vyakunta Bapuji* v. *The Government of Bombay*, 12 Bom. H. C. Rep., App. at pp. 57, 58, 59, 60; and see *Doe d. Hirabai* v. *The East India Company*, Perry's Or. Ca. 480, and 1 Mad. H. C. Rep. 12, 407.

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Directors of the East India Company written in 1822 to the Government of Bombay,(1) where, speaking of a draft regulation prepared for the purpose of giving greater validity to the result of surveys yet to be undertaken, the Directors said :—"The preamble, as it originally stood in the draft prepared by Captain Williams, is much more correct than the preamble as altered at the suggestion of Mr. Prendergast (a member of Council), which asserts the proprietary right in the land to be vested in the Ruling Power, whereas, in the draft of Captain Williams, it is stated that the Ruling Power is entitled to a certain share of the produce of the land." That preamble, in its *primâ facie* sense, is also negatived by the authorities collected in *Vyakunta Bapuji* v. *The Government of Bombay*.(2) But, even were it to be regarded as portion of the enacting part of the Regulation III of 1814, it should be restrained in construction in the same manner as a similarly ample recital, couched in the same words, in Madras Regulation XXXI of 1802 was controlled by the Privy Council in *The Collector of Trichinopoly* v. *Lekkamani*,(3) where it was decided that the object of that Regulation was only the protection of the revenue from invalid *lakhiraj* grants, and to provide for the mode of trying the validity of the titles of persons claiming to hold their lands exempt from the payment of revenue, and that it was not intended to confer upon Government any title which did not then exist.(4) Bombay Regulation III of 1814 was precisely in *pari materiâ*, and would necessarily receive the same construction. But such a recital, taken in its full apparent breadth, is as valueless legally as it is historically. The preamble is no part of the enactment, and "a mere recital in an Act of Parliament" (and, therefore, in Acts of the local legislatures) "either of fact or law is not conclusive, and we are at liberty to consider the fact or the law to be different from the statement in the recital."(5) The more moderate proposition (that the proprietary right to *waste* land is *primâ facie* vested in Government), contained

(1) Rev. Sel., Vol. IV, p. 646.

(2) 12 Bom. H. C. Rep., App., pp. 30 to 56.

(3) L. R. 1 Ind. App., 282, 304, 308.

(4) See 12 Bom. H. C. Rep., App. 75 to 77.

(5) Per Lord Campbell, C.J., in *Reg.* v. *Haughton*, 1 El. and Bl. 501. For another recital inconsistent with fact, see the first sentence in the preamble to Bom. Act VI of 1862 (The Talukdari Act); and compare it with Mr. Peile's Report No. CVI of the New Series of Bombay Govt. Records, p. 13, *et seq.*

or implied in Bombay Regulations I of 1808, Section 59, and XVII of 1827, Section 7, is reasonable and founded upon truth.

In *Gureeb Hossein Chowdry* v. *Lamb*,(1) the Calcutta Sadr Divani Adalut in 1859 substantially held that the bed of a navigable river, where the tide flows and ebbs, must be *primâ facie* regarded as vested in the State, and the fishery in it as open to the public, and refused to recognize either of the riparian proprietors as lords of the soil of the river, or as entitled to any exclusive or special right of fishing in it. The Court said that it appeared, "from the pleadings, that the *julkurs* sued for, extend over a large area in the bed of a navigable river, the Megna—that is, a river in which the tide ebbs and flows; and by our Regulation Laws—Regulation XI of 1825 (Bengal), which is declaratory of the common law of this country—as well as by the common law of England, the bed of a navigable river is not the property of any individual, and consequently the right of fishery in such rivers is not private property, but that right is a right common to every person; and if any individual claims an exclusive right in navigable waters, he must show that it has been acquired by grant or prescription, which is evidence of a grant, and until that be shown, the presumption is strong against his claim,"(2) and, again, after terming the Government "a trustee for the public,"(3) the Court said:—

"Had the present claims, advanced on either side, been for the exclusive right of fishing in a river *above* the ebbing and flowing of the tide, as well as for their right to the property in the stream opposite to their respective lands, in that case the claims of the parties would have been limited" (I presume the Court meant *primâ facie* limited) "by the extent of their riparian ownership, and we should, even then, have required clear proof on either side; but in a case like the present, in which the claim is apparently bounded by nothing but the desires of the parties before the Court to possess, and in which what may be termed an arm of the sea is in litigation, to prove the right set up, the evidence of a grant, or prescription evidencing a grant, must be of the very strongest

(1) Calc. S. D. A. Rep. 1859, p. 1357. (2) Calc. S. D. A. Rep., p. 1361.

(3) p. 1362.

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nature."(1) That decision is conformable to English Law, and is, I think, sound as Indian Law; but whether it derived quite so much support from Bengal Regulation XI of 1825, as the Sadr Adalut seemed to think, is not very certain. That Regulation relates to lands gained by alluvion or dereliction of a river or the sea.(2) Its 2nd section and the 5th clause of its 4th section recognized immemorial usage in such localities as it might be found to prevail. In other cases, its 3rd section and 4th section (clauses 1, 3, and 4) pointed out who should be regarded as the holder of lands so gained, and that the increment should be liable to Government land assessment in his hands. The 3rd clause of that section, which treats of the formation of islands in large navigable rivers and in the sea, expressly contemplates the possibility of the bed of such a river being the property of a private individual, but is silent as to such a possibility in the case of the soil under the sea, and leads to the inference that the legislature did not suppose that the soil beneath the sea was to any important extent vested in private persons. I should also be inclined to infer from that clause, taken together with the 5th section to which I shall presently refer, that the case of the bed of a navigable river being the property of a subject was the exception and not the rule. The inference is not very strong. It is clear, however, from the same clause that, except where the channel between an island in such a river *or the sea* and the land of the adjacent riparian proprietor is "fordable,"(3) the island is State property. The inference, though not conclusive, from the 4th clause of the same section, appears to be that the beds of non-navigable rivers are generally private property. The 5th section declares that nothing in this Regulation shall be construed to justify encroachments by individuals on the beds or channels of navigable rivers, or to prevent the officers

(1) Calc. S. D. A. Rep., p. 1366.

(2) Upon that subject see Beng. Reg. II of 1819 (s. 3, cl. 2), Acts IX of 1847, XXXI of 1858, and XIX of 1873, ss. 77, 104, 257. See also the Hedaya, Vol. IV, pp. 136, 143, as to rivers, and 1 Calc. S. D. A. Rep., 221, 319; 2 Id. 269; 3 Id. 316; 4 Moo. I. App. 403; 12 Id. 136; 13 Id. 1, 467; 14 Id. 595; 3 Beng. L. R. App. 116; 10 Id. 406; 14 Id. 268; Beng. L. R. F. B. 353; 1 Calc. W. R., 124, 713; 2 Id. 10, 284, 295, 324; 4 Id. 65; 5 Id. 55; 6 Id. 40, 76, 249; 7 Id. 42, 67, 203, 231; 8 Id. 164, 287, 427; 9 Id. 379; 10 Id. 67; 11 Id. 116; 12 Id. 204, 252, 272; 18 Id. 64; 19 Id. 127, 114; 20 Id. 117, 276, 427; 21 Id. 115, 446; 22 Id. 238, 324; 23 Id. 38, 443; 24 Id. 435; 25 Id. 129, 242, 390; Calc. W. R. (1864) 64, 302, 301; Calc. W. R. F. B. 22; 3 Agra, 1.

(3) As to the meaning of this word see 6 Beng. L. R. 343; Calc. W. R. (1864) 302; 2 Calc. W. R. 34, 127; 6 Id. 123; 7 Id. 574; 10 Id. 272.

of Government from removing obstacles to the safe and customary navigation of those rivers by tracking or otherwise. It will from this brief summary of the Regulation be seen that, although it does not, in such distinct terms as might, from the language of the Sadr Adalut, be expected, support the above-mentioned decision of that Court, yet it is not in any respect inconsistent with that decision, and leans more in favour of, than against, it. In *Chunder Jalleah* v. *Ramchurn Mookerjee*,(1) decided by the High Court of Calcutta in 1871 (Kemp and Glover, JJ.), it was held that the bed of a river which was navigable for boats, but where the tide did not ebb or flow, might be the property of a subject. Glover, J., there drew attention to the circumstance that there is not in India, as in England and Ireland, a Magna Charta or legislative prohibition of grants by the Crown of a several fishery in a navigable river. Expressing his opinion that the governing power might, in India, make such a grant, he specified instances in which it had done so, within the last century, in navigable but not tidal rivers.(2) The creeks in Salsette (which are all tidal) appear, from Bombay Regulation I of 1808, Section XIII, to have been, to some extent, let out at rents (*rend kharee*, or creek-rent) by Government. There is nothing before us to show that the *rend-doly* spoken of in Section VI (Clause 2) of the same Regulation as "a due," payable to Government on fishing stakes "set up in the Salsette waters," applied to any stakes, except those in creeks, in which Salsette abounds. It appears to have been leviable in 1808 (Section XXX, Clause 5), but it has not been contended before us that it is, or ever was, enforced with respect to fishing stakes in the open sea. The Angdena or poll-tax levied on the Koli (corruptly cooly) caste, to which many of the parties in this suit belong,(3) and which, in 1798, yielded Rs. 16,405,(4) being of the nature of Muhtarafa (corruptly Mohturfa), or tax upon trades, arts, or professions,(5) was abo-

(1) 15 Calc. W. R. 212 Civ. Rul.

(2) 15 Calc. W. R. 215 Civ. Rul. See as to the conflict of decisions in America on the question whether navigability in fact is navigability in law, *i.e.*, whether tides are necessary to make a river navigable in law, the note (f) at pp. 3, 4 and 5 of Hall's Sea Shore.

(3) Bom. Reg. I of 1808, ss. VI (cl. 2) and XXXVIII.

(4) Bom. Reg. I of 1808, Sec. L, and see Sec LXXV.

(5) Bom. Reg. I of 1808, ss. VII (cl. 3) and XXXVIII. The tax on sellers of dry fish and the tax called bombil are of the same character, ss. VI (cl. 2) and XIII.

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lished by Act XIX of 1844. Mr. Erskine in his judgment already referred to (and who certainly had the means of obtaining correct information, and would not fail to use his opportunities), made some valuable observations upon it.[1] He said: "It appears that the old taxes on fishermen (of which notice is taken in Reg. I of 1808) were levies on all Kolis over 16 years of age, whether they fished or not, and whether they lived in a sea-board village or not. The principal cess was capitation, or body-tax (angdene). It seems to have been in no respect an optional payment required only from those who actually wished to practise fishing, but a compulsory impost exacted from all full-grown men of the common fishing caste, in the belief apparently that if any adult males of that caste did not engage in sea-fisheries, they were rare exceptions to the general rule, and also that the number of persons of other castes who did engage in that trade was inconsiderable, and not such as to require that special rules for their taxation should be adopted.[2] There is nothing, in short, to show that this tax was in any way analogous to a sporting license (giving liberty to catch fish where they could be caught without trespassing upon the property of others). It does not seem that the not being a payer of this cess disabled a man of another caste from trading as a sea-fisher, or that a Koli who paid the cess might exercise his calling only within a limited space opposite to his own village." We have no reason to suppose that there has been by Government anything in the nature of a grant or demise of the right of fishing in the sea of Yerangal, or of any other part of Salsette, to any of the parties in this cause, or any other persons, or that the fishery of those seas can in any respect be viewed as a private fishery. It is unnecessary for us to express an opinion whether Government could in India create such a fishery in the sea. From *Doe d. Seebristko* v. *The East India Company*[3] it would appear that Her Majesty's Privy Council were of opinion that the beds of navigable tidal rivers in British India are vested in the State. The similar rule of law as to beds of such rivers in Great Britain and Ireland, already mentioned, was thus laid down by Lord St. Leonards in *The Lord Advocate* v. *Hamilton*.[4]

(1) 9 Harrington S. D. A. Rep. 286.

(2) *Vide* Bom. Reg. I of 1808, Sec. XXXVI.

(3) 6 Moore's I. A. 26.

(4) 1 Macqueen [H. L.] 46.

"With respect to the question which has been mooted as to the rights of the Crown to the *alveus* or the bed of a river, it really admits of no dispute; beyond all doubt the soil and bed of a river (we are now speaking of navigable rivers only) belongs to the Crown." In *Bagram* v. *The Collector of Bullooa*,(1) although the plaintiff established his right to a private fishery in certain tidal and navigable rivers, the principles laid down in *Chunder Jalleeah* v. *Ramchander Mookerjee* (2) and *Doe d. Seebristko* v. *The East India Company*(3) were adopted and approved.

Assuming, as I think we may, that the proposition—that the beds of tidal rivers in British India are, like those of such rivers in Great Britain, *primâ facie* to be regarded as vested in the Crown—is established, the transition thence to the proposition—that the subjacent soil of the British Indian Seas, within the territorial limit of three geographical miles from low-water-mark, is also vested in the Crown—is (if the like proposition as to the territorial waters of Great Britain be true) not difficult, for a navigable river, in such part of it as the tide flows and ebbs, is an arm of the sea. We gather from the elaborate judgments in *Reg.* v. *Kastya Rámá*(4) that the learned Judges who gave them regarded the sea and its subjacent soil, within the ordinary territorial limit at least around British India, as vested in the Sovereign, but held that the use of it for the purposes of navigation and fishing belonged *communis juris* to her subjects, at least so far as it had not been otherwise appropriated by the Sovereign; and West, J., in speaking of the prerogatives of the Crown in India in this respect, said: "I am not aware that in any case they have been so used as to exclude any subject in this country from fishing in any part of the sea. No grant of a fishery in the present case has been set up either as directly proved or as to be inferred from prescriptive enjoyment. The complainants and the applicants alike must rest on their common right of fishing in the sea; and a permission in favour of one or other of the parties by the villagers of Yerangal, as given without title, could confer none

(1) Calc. W. R. for 1864, p. 243 Civ. Rul.

(2) 15 Calc. W. R 212 Civ. Rul.

(3) 6 Moore's I. A. 26.

(4) 8 Bom. H. C. Rep. 67, 68 69, 70, 86, 87, 88, Cr. Ca.

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upon either."[1] Whether or not the sea and its subjacent soil be vested in the Sovereign as her property, would not seem to be a vital question, if there has not been by the Sovereign, as appears to be the fact in the present case, any appropriation or attempted appropriation of the sea or its soil or the right of fishing in the former to any particular individuals, for where there is no such appropriation, even if the sea and its soil be vested in the Sovereign, the right of fishing in the territorial waters of British India would be common to all her subjects in that country; and if the sea and its soil be not so vested, the right of fishing in those waters would still, as well according to the Roman law as the law of nations, be common to the inhabitants of British India.

It was argued on behalf of the defendants that the plaintiffs' alleged right to fish off Yerangal, if it existed at all, was immoveable property not situated within the district of Thana, and, therefore, under Act VIII of 1859, Section 5 (9 Harr. S. D. A. Rep. 277) the District Court had no jurisdiction. But, neither the plaint in this suit, nor the learned counsel for the plaintiffs, claimed any private or exclusive right of fishing off Yerangal. The latter rested his clients' case upon the fact that they were subjects of Her Majesty in British India, and, as such, had a right, common to themselves and all other members of the public in that country to fish in its adjacent seas. It is necessary to distinguish between a common of fishery and a common fishery, as to which, as well as to free fishery, and several fishery, there is some confusion in English Law Books and Reports.[2] A common fishery is a public fishery, *i.e.*, a fishery open to the public. A common of fishery is one of the species of private fisheries. The distinction was clearly brought out in *Benett* v. *Costar*[3] where Dallas, C.J., said:—"A common of fishery is a right in common with *certain* other persons in a particular stream;" to which I would add "or other water." Dallas, C.J., continued:—"Though text writers have used the terms *communem piscariam* and *communiam piscariæ* indifferently, a common fishery extends to all mankind. The defendant should have leave to amend by

(1) 8 Bom. H. C. Rep. 88, Cr. Ca.

(2) As to this confusion see Hargrave's note 7 to Co. Lit. 122*b*.

(3) 8 Taunt. 183, 187.

introducing the word *of*." (1) Blackstone(2) and others have treated a free fishery as identical with an exclusive right of fishing in a public river, and as differing from a several fishery, of which Blackstone says that the owner must also be, or derive his title from, the owner of the soil. But in *Malcolmson* v. *O'Dea*(3) Willes, J., in giving the opinion of the Judges, said :—"Some discussion took place during the argument as to the proper name of such a fishery, whether it ought not to have been called in the pleading (following Blackstone) a 'free' instead of a 'several' fishery. This is more of the confusion which the ambiguous use of the word 'free' has occasioned from a period as early as that of the Year Book of 7 H, 7 P, fo. 13, down to the case of *Holford* v. *Bailey*,(4) where it was clearly shown that the only substantial distinction is between an exclusive right of fishery, usually called 'several,' sometimes 'free,' used as in 'free warren,' and a right in common with others, usually called 'common of fishery' sometimes 'free' (used as in free port). The fishery in this case is sufficiently described as a several fishery, which means an exclusive right to fish in a given place, either with or without the property in the soil." Mr. Justice Phear in his treatise describes the various kinds of fisheries thus:—"It is a *several fishery* when one has the exclusive right, to whatever extent, of fishing in waters covering land which does not belong to himself ; and this right is not the less exclusive because other persons have also rights of fishing in the same waters,(5) provided that the latter rights do not conflict with the former:—for instance, the exclusive right to take all fish, except oysters, is a several fishery, although another person has a right to take the oysters. A several fishery is so far unlike most other easements as to be capable of being trespassed upon ; (6) this quality is probably common to all exclusive *profits à prendre*.(7) The natural right of the

(1) In *Blundell*, v. *Caterall*, 5 B. and Ald. 294, Holroyd, J., usually a most accurate speaker, appears, *per incuriam*, to have used the phrase "a common of fishery" for "a common fishery." L. C. J. Hale, in his treatise, used the phrase "public common of fishery." The employment of the word "public" shows that what he meant was a common fishery

(2) 2 Blackstone's Com., p. 39.

(3) 10 Ho. of Lds. 618.

(4) 13 Q. B. 426.

(5) *Seymour* v. *Lord Courtenay*, 5 Burr. 2814.

(6) Trespass on a several fishery lies even for disturbing the fish, though none be taken. *Holford* v. *Bailey*, 13 Q. B. 426.

(7) Selwyn's N. P. Tit (Trespass).

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owner of the land to the exclusive fishing in the waters which are upon it, is also termed a several fishery; and therefore[1] where a several fishery is in question, in the absence of evidence as to its origin, it will probably, except against the public right to sea-fishing, be presumed to arise by virtue of ownership of the land and water, rather than to exist as an easement. If the original grant can be produced, and its terms are such as to convey an incorporeal hereditament only, then the several fishery passed by it is simply an easement."[2]

This latter kind of several fishery, *i.e.*, where the ownership of the soil and the right of fishery are associated in the same person, is, for distinction, appropriately styled by Serjeant Woolrych, in his treatise on waters, "a territorial fishery."[3] Mr. Justice Phear continues:—"It is a free fishery when several *specified* persons have equal rights of fishing in the same waters.[4] It is a *common of fishery* when all the persons of a certain class, as all the tenants of a manor, or all the dwellers in a parish, have equal rights of fishing in the same waters. And it is a *common fishery* when all the subjects of the realm have equal rights, as is the case in the sea and navigable rivers." All of these fisheries except the last are private fisheries, and, with that exception, would, in England, when the owner enjoyed a free-hold interest in them, be real property.

Sir Thomas Strange, in his treatise on Hindu Law,[5] divides Hindu property into moveable and immoveable, and classes the former with personal and the latter with real estate—terms known to the English Law; noticing, however, that, differently from that law, both species of property are descendible amongst Hindus to the same persons. Without affirming that, in every instance, what is moveable by Hindu Law is personal by English Law, or that what is immoveable according to the former is real according to the latter,[6] (and admitting the very special exception of what in

(1) 5 B. & C. 886; *D. of Somerset* v. *Fogwell*, Co. Lit. 122*a*; Hargrave's note 7.

(2) B. & C. 886; Co. Lit. 46, Shep. Touch 97.

(3) Pages 110, 111, 113.

(4) *Seymour* v. *Lord Courtenay*, Burr. 2814.

(5) Vol. 1, pp. 1, 16 and 17.

(6) See 9 Bom. H. C. Rep. 99, 111; 10 Bom. H. C. Rep 281; L. R. I. Ind. App. 34 as to the meaning of the phrase "immoveable property" in the Limitation Acts.

England are termed chattels real), it is sufficient to say that, generally speaking, that coincidence is found to exist, and there does not seem to be any reason for presuming that private fisheries constitute an exception. The Hindu Law books, so far as I can discover, are silent as to fisheries public or private—and in that silence the general rule may be assumed to prevail with respect to private fisheries. The Muhammadan Law does not make any distinction similar to that between moveable and immoveable, personal and real property.(1) We now revert to public fisheries.

Real property consists of lands (which would comprise waters actually covering those lands)(2) and hereditaments, which last phrase includes lands and tenements. Hereditaments are divided into corporeal and incorporeal.(3) It has not been and could not be contended that the common right of the people of British India to fish in its territorial waters (part of which we must regard the sea off Yerangal to be) is a corporeal hereditament. It is suggested, however, that such a right may be regarded as an incorporeal hereditament, but I cannot perceive how it can be regarded as an hereditament of either sort. Whether we assume the property in that sea and its subjacent soil to be vested in the Sovereign, or assume this not to be so, but that the right of fishing in that sea, as part of the maritime territory of the country, is open to its inhabitants at large, a subject of Her Majesty in this country, although his father may have been an alien and never owed allegiance to the Crown of England, nor ever came within this country or its marine territory, would be entitled to this right on becoming a denizen thereof. Again, if his father had been one of Her Majesty's subjects here, the son would, as a member of the public in British India, enjoy that right quite

(1) Macn. M. L., p. 1, and Preliminary Remarks, p. LXXII, note.

(2) Co. Lit. 4*a*; 1 Stephen Com. 169, 4th Ed.; Calc. W. R. (1864) 62.

(3) Bracton, after dividing things into those which are within and those which are beyond our patrimony, and sub-dividing the former into moveables and immoveables, says: "Fit et alia et secunda divisio rerum, quia aliæsunt corporales, aliæ incorporales—corporales vero sunt quæ tangi possunt, sicut terra, fundus, res immobiles vel res mobiles quæ se movere possunt, sicut animalia vel hujus modi, vel moveri. Incorporales vero sunt, sicut sunt jura, quæ videri, non possunt, nec tangi, ut jus eundi, agendi, aquamve ducendi, et hujus modi, quæ non possidentur sed quasi." Lib. I, c. 12, pl. 3. *Vide* 2 Bl. Com. 16, 17, 34, 417; 1 Stephen Com. 168, 171.

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independently of his father, and as fully in his father's life-time as after his decease.

Lord Chief Justice Willes and his colleagues in the Court of Common Pleas in *Ward* v. *Cresswell*,(1) allowed a general demurrer to pleas in replevin alleging a prescriptive right annexed to certain tenements to fish in the sea, saying:—"We are all clearly of opinion on the second objection, which equally applies to both pleas, that the prescription is void, because the right claimed, as annexed to certain tenements, is a general right for all the subjects of the kingdom. In *Pell* v. *Towers*(2) it was agreed 'that a man shall not prescribe in that which the law of common right gives.' Now 'every man may fish in the sea of common right,' 8 Edward IV 19*a*.(3) In *Warren* v. *Matthew*(4) it was holden that 'every subject of common right may fish with lawful nets in a navigable river, as well as in the sea.' So in 1 Mod. 105. And this is not merely the law of this country, but is also the law of nations.(5) And Bracton(6) says, 'Publica vero sunt omnia flumina et portus. Ideoque jus piscandi omnibus commune est in mari et in fluminibus.'(7) This presciption, therefore, for a right common to all of the subjects of the realm cannot be supported. A man might as well prescribe that he, and all whose estate he has, have a right to travel on the King's highway as appurtenant to his estate."

An inference from that case is that the right of the public to fish in the sea or a tidal river is not an easement, inasmuch as for an easement you may prescribe, whereas that case decides that for a right to fish in the sea, you cannot prescribe, because it is a right common to all of the subjects of the realm. The circumstance that it is not an easement is more favourable to the theory of the Roman Law, that the sea and the right of fishing

(1) Willes' Rep. 265, 268, Ed. of 1800, Dublin; 16 Vin. Ab. Tit. Piscary B.

(2) Noy 20. Bro. Abr. Tit. Prescription, pl. 71.

(3) Per Choke, J.

(4) 6 Mod. 63; Salk. 357.

(5) Grot. de Jur. Belli. et Pac., B. I, C. 3; F. 9.

(6) Lib. I, c. 12, s. 6.

(7) See Selden's Mare Clausum, Bk II, ch. XXIV, pp. 383, 384, 392 of the Eng. translation by J. H., published in 1663. The word "fluminibus" must here be limited to navigable rivers which are tidal. The word 'tide' includes the fresh water forced back by the sea water, 2 Douglas R. 441; 6 Cl. and F. 628.

therein are *communia jure* than to the proposition that they are vested in the Sovereign. The passage from Bracton, of which Willes, C. J., quoted only a portion relating to ports and rivers, is almost, though not quite, a transcript of what has been above quoted from the Institutes, and contains (inter alia) the following :—" Naturali vero jure communia sunt omnia haec : aqua profluens, aer, et mare, et litora maris quasi maris accessoria." (1) I refer to that remark of Bracton, so far as it relates to the sea only, and not in relation to the sea-shore. How far his doctrines as to the sea-shore, or as to the banks of rivers, are now law in England, it would be irrelevant here to inquire.(2)

In *Lloyd* v. *Jones*,(3) which was an action of trespass for having entered on the plaintiff's land and fished there in his waters, the defendant pleaded that he did so in exercise of a right conferred upon him as an inhabitant of the town of Bala under an immemorial custom. The Court of Common Pleas held that the custom set up was, in effect, a custom for the inhabitants of Bala to have a *profit à prendre* in the soil of another, and that no such custom could exist in point of law. (And that point was subsequently similarly decided in *Bland* v. *Lipscombe* by the Queen's Bench.(4)) It had been contended for the defendant Jones that the claim, which he put forward, was for an incorporeal hereditament, and, therefore, that the County Court (in which the action had been brought) was, by Section 58 of Act 9 and 10 Vic., c. 95, deprived of jurisdiction to entertain the action, but the Court said :—" 'Hereditament' is defined in the text books to signify 'all such things, whether corporeal or incorporeal, which a man may have to him and his heirs, by way of inheritance, and which, if they be not otherwise bequeathed, come to him which is next of blood, and not to the executors or administrators, as chattels do.'(5) It is obvious that the right claimed under the custom alleged is not a claim to a hereditament, and therefore, not such as to exclude the jurisdiction of the County Court." The claim of the defendant, on behalf of himself and the other inhabitants of

(1) Bracton, Lib. I, cap. 12., pl. 5.

(2) See *Ball* v. *Herbert*, 3 T. R. 253-263, per Buller J.; *Blundell* v. *Caterall* 5 B. and Ald. 268; Hall's Sea Shore 156 *et seq.* 161 to 186, 2d. Ed.: Woolrych on Waters 9, 164.

(3) 6 C. B. 81, 90.

(4) 24 L. J. N. S. Q. B. 155, note 4. 6*a* 16.

(5) Termes de la Ley 388; Co. Lit.

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Bala, amounted to an alleged common of fishery with the plaintiff in the river Treweryn under an immemorial custom. The Court, as I have observed, held: 1. That no such right could exist by custom; and 2ndly, that if it could so exist, it would not be a hereditament. That case being a claim for a common of fishery, which is one of the species of private fisheries in the soil of another, differs from the claim here, which is for a common (or public) fishery, in respect of which the plaintiffs, as members of the public, claim to fish in the sea off Yerangal. But the reasoning, by which the Common Pleas arrived at the conclusion that the alleged common of fishery was not a hereditament—viz.: that the alleged right was not descendible to the heirs of the defendant and of the other inhabitants of the town of Bala—applies equally here; the plaintiffs' right appertaining to them as members of the public, and not, as already explained, being descendible to their heirs whether they be inhabitants of Malavni or not.

In relation to the other passages above quoted from the judgment of Bayley, J., in *Blundell* v. *Caterall*,(1) to the effect that the right of the Crown to the sea is not, in general, for any beneficial interest to the Crown itself, but for securing to the public the privileges of navigation and fishing, I may refer to the treatise of Mr. Justice Phear, in p. 44, where he says that "the Crown simply represents the public," and "is in fact its subjects' trustee."(2) This remark, however, may be due to the fact that, in England and Ireland, the Royal power is limited by Magna Charta, as already mentioned. Subsequently at p. 52 he observes:—"When, as is generally the case, the soil of the shore is in the Crown, the rights of the public in the sea or tidal waters, such as rights of fishing and navigation, &c., are natural rights accruing to them as *cestuis que trustent* in possession; but, when a private individual holds the shore, such of these rights as remain to the public have become, strictly speaking, 'easements.'"(3) The natural rights here spoken of are by Mr. Austin denominated *res publicæ*.(4) Mr. Phear's distinction of

(1) 5 B. and Ald. 294.

(2) See also note *l.* to p. 45, and note *m.* to p. 47 of Mr. Justice Phear's Treatise.

(3) Mr. Justice Phear's Treatise, p. 52.

(4) 3 Austin Jur. 56.

these rights, which he calls natural, from easements, is supported by *Ward* v. *Cresswell*,(1) above cited, which decided that the right to fish in the sea is not the subject of prescription, whereas easements may be prescribed for. Hence, independently of other reasons for the same conclusion, it follows that the right of the public to fish in the sea is not an easement. Nor again is it a *profit à prendre in alieno solo*. A private right of fishery over the soil of another is a *profit à prendre*—*Wickham* v. *Hawker*,(2) but a right to take water from a spring in the soil of another is not a *profit à prendre*. In deciding this to be so in *Race* v. *Ward*,(3) Lord Campbell, C.J., said :—"The water which they (the defendants) claim a right to take, is not the produce of the plaintiff's close; it is not his property; it is not the subject of property." In support of this proposition Lord Campbell referred to Blackstone, who, in Vol. II, Comm. p. 14, says:—"But, after all, there are some few things which, notwithstanding the general introduction and continuance of property, must still unavoidably remain in common; being such wherein nothing but an usufructuary property is capable of being had; and therefore, they still belong to the first occupant, during the time he holds possession of them and no longer. Such (*among others*) are the elements of light, air, and water, &c." Afterwards,(4) having stated that a man cannot bring an action to recover possession of a pool, pond, water-course, rivulet, or other piece of water (*quære* whether he is right as to a pond or other stagnant water, and see *Challenor* v. *Thomas*), either calculating its capacity, as for so many cubical yards or by superficial measure for twenty acres of water.(5) Blackstone gives the reason: 'For water is a moveable wandering thing, and must of necessity continue common by the law of nature,' Ibid. p. 18. It was in *Challenor* v. *Thomas*(6) held that 'ejectment' would not lie for 'a certain rivulet and water-course,' for a rivulet or water-course neither lies in demand, nor does a præcipe lie for it, nor can livery of seisin be made of it, for it does not stay (*non moratur*), but is always flowing, nor

(1) 5 Willes Rep. 265.
(2) 7 M. & W. 63.
(3) 4 El. and Bl. 702, 709.
(4) Vol. II., Bl. Com., pp. 17, 18.
(5) For this, Blackstone refers to Brownlow 142, which is the case of *Challenor* v. *Thomas*, better reported, however, in Yelverton 143. See Co. Lit. 4b.
(6) Ibid.

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can it be given in execution, nor can seisin be had of it, for it cannot be given into the possession of any one, and is like to (a Writ of) protection *quia moratur super mare*, which is not allowable by 35 Hen. 6, for *mare non moratur*, but as it is in 12 Hen. 7 4, the action ought to be for so many acres of land covered with water. And ejectment lies for a gors[1] or stagne,[2] for a præcipe lies for them, and a woman will be endowed of the third part of a gors, as in 11 Ed. 3 is stated. But if the land under the river or under the water does not belong to the plaintiff, but the river only, then on disturbance his remedy is only by action on the case for any diversion of it and not otherwise." The decision in *Race* v. *Ward*[3] would seem to be applicable here, because it rested on the circumstance that running water (*aqua profluens*) is common, like air and light, and not the subject of property. The right of the public to fish in the sea is common, and not, as I think, the subject of property, and may be enumerated amongst the natural rights other than light, air, and water referred to, but not specified in detail by Blackstone. In *Race* v. *Ward* the Court, it is true, while holding the right to go upon the plaintiff's soil to take water not to be a *profit à prendre*, also held that it was an easement; but that was because, in order to take it, it was necessary to go upon the land of a private individual. Here the plaintiffs may fish in the sea as of common right, whether it and its subjacent soil be or be not vested in the Crown.

The fisheries mentioned in Act XVI of 1838, Section 1, Clause 2, as to which the Revenue Courts, and the fisheries mentioned in Act X of 1872 (Criminal Procedure Code), ss. 530 and 531, as to which the Magistrates are respectively empowered summarily but temporarily to decide questions of possession, would seem to be private fisheries, [4] and so also the fisheries which, for the purposes of the Registration Acts XX of 1866[5] and VIII of 1871,[6] are in the glossarial clauses of these Acts included amongst

(1) As to this word, see 10 Ho. of Lords 619, 620. In *Challenor* v. *Thomas* it would seem to mean a fish pond.

(2) Rendered by Brownlow *etang*, a pond, derived from the Latin *stagnum*.

(3) 4 El. and Bl. 702.

(4) *Vide* per West, J., 8 Bom. H. C. R. 84 Cr. Ca.

(5) Sec. 2.

(6) Sec. 2.

"immoveable property." It would be impossible to hold the Registration Acts to be applicable to the right which every member of the public, whether he be a fisherman or not, has to fish in the sea. Such a right could neither pass by livery, grant, descent, or devise.

It follows from what has already been said, that, even if this suit had been brought in the Court of the Principal Sadr Amin, where the former suit was instituted, in its present form while Act IX of 1844 was in force, the Court within whose jurisdiction the parties reside would, I think, have had jurisdiction, because, for the reasons already given, it does not "relate" to "landed or other real property" within the 3rd Section of that Act, and the objection made successfully in the former suit, that the sea off Yerangal is not within the local jurisdiction, must have failed in this suit, constituted as it is. Act VIII of 1859 (Civil Procedure Code), Section 5—the enactment applicable to this suit—is more favourable to the jurisdiction than Act IX of 1844; for, even assuming that this suit "relates" to immoveable property, there would be some difficulty in saying that, within the terms of the 5th Section of Act VIII of 1859, it is a suit brought "*for* land or other immoveable property" being merely in the nature of an action on the case for preventing the plaintiffs from fishing. It is not, however, my desire to lay much stress on the difference in language of those enactments, inasmuch as I am satisfied to rest my opinion on the question of jurisdiction upon the ground that the right of the public to fish in the sea does not come within the description of property of any kind. Nobody, I may here observe, has ever heard in England of such a right being, as property, subjected to probate or succession duty. Jurisdiction being given by Act VIII of 1859, Section 5, in actions not brought for land or other immoveable property, to the Courts within whose jurisdiction defendants reside, there is not any necessity for resorting to the system of fictitious venues which grew up in England.

Next as to the defence of *res judicata*.

The plaintiffs in the former suit, reported in 9 Harrington S. D. A. Rep. 276 (where that suit is denominated, by the reporter, an action of ejectment), alleged that they were entitled to an

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ancestral fishing ground where they and their ancestors had for a long period of time planted fishing stakes and caught fish. They set it out by boundaries, stating that Yerangal village lies on the east of it. They aver that the defendants forcibly entered it, and planted their own fishing stakes there, and obstructed the plaintiffs in their fishing. The plaintiffs denied the right of the defendants to enter upon that fishing ground, and alleged that they (the plaintiffs) were entitled to exclude the defendants from it, and prayed the Court to effect that exclusion, and that the defendants should be enjoined against obstructing the plaintiffs in the fishing. Strictly speaking, the various forms of action known in England were never in force in the Mofussil. It was not, however, unusual to describe suits here according as their objects would have caused them to be classified had they been instituted in England. A perusal of the plaint in the former suit leads to the conclusion that it sounded in ejectment and trespass. Serjeant Adams, in his treatise on ejectment, p. 20, referring to Cro. Jac. 144, Cro. Car. 492—8 Mod. 275-277, says: "In the old cases it is holden that an ejectment will not lie for a fishery, because it is only a *profit à prendre*, but it is said by Ashurst, J., in the case of *The King* v. *The Inhabitants of Old Alresford*[1]:—"There is no doubt but that a fishery is a tenement; trespass will lie for an injury to it, and it may be recovered in ejectment." Trespass will lie for breaking and entering the "several" or, what is equivalent to it, "sole and exclusive" fishery of one person over the soil of another, and disturbing the fish—*Holford* v. *Bailey*[2]—or for a free fishery. Ashurst, J., in saying that a fishery might be recovered in ejectment, most probably had in his view only an action of ejectment for a territorial fishery, that is to say, brought by a person in whom a several fishery is united with the ownership of the soil over which the right of fishery is claimed, as was the fact in *The King* v. *Alresford*. The old cases referred to by Serjeant Adams show that ejectment will not lie where the right of fishery is dissociated from the ownership of the soil, *i.e.*, where the right is a mere *profit à prendre in alieno solo*. The allegations in the plaint in the former suit account for that suit assuming, to some extent at least, the character of an

(1) 1 T. R. 358, 361, and see Woolrych on Waters, pp. 239, 246.

(2) 13 Q. B.; 426 18 L. J. Q. B 109, Exch.

action of ejectment. That suit was brought in September 1856 in respect of occurrences previous to that time, and proceeded on the hypothesis that the plaintiffs had an exclusive proprietary title to fish off Yerangal. In short, they claimed a private several fishery, and seemed to treat that fishing ground as solely their own. The present suit is brought by the plaintiffs in respect of occurrences in March 1872 and sounds in case, not in trespass or ejectment. The plaint does not allege the fishing ground to be that of the plaintiffs. It has been argued throughout on both sides as merely claiming for the plaintiffs the ordinary right of all Her Majesty's subjects to fish in the sea, and the plaint alleges that such right was exercised off Yerangal by the plaintiffs and defendants in a manner regulated by custom. It complained of the defendants having, in breach of that custom, planted a row of stakes parallel to those of the plaintiffs at a distance of 120 feet from the latter, "whereby the defendants had wilfully disturbed and caused an unnecessary obstruction to the plaintiffs' right of fishing in the said waters, and wrongfully and unjustifiably prevented fish from coming into the power of the plaintiffs, as they would otherwise have done, and whereby the defendants also have materially interfered with and injured the said trade of the plaintiffs, and caused the plaintiffs considerable pecuniary loss and damage." I fully concur on this point also with my learned colleague in thinking that the cause of action in this suit differs considerably from that in the former action. Here a common fishery, regulated by custom, is asserted—there a several fishery was claimed. The defence of *res judicata*, therefore, would, upon this ground alone, fail. But, further, the previous suit was, by the Sadr Divani Adalut, decided, not upon the merits, but solely upon the incompetency of the Lower Courts in respect of jurisdiction. It is for these reasons impossible, under Section 2, Civil Procedure Code, to hold the decree in that suit any bar to the present suit.

The last objection made on behalf of the defendants is that this suit will not lie on the merits, as alleged in the plaint. We, however, think that it will lie, if the facts stated be proved, and we are not disposed to view in a very critical spirit the plaint as framed. If the plaintiffs have, as we hold to be the case, a right to fish in the sea off Yerangal as members of the public, and the defendants have a similar right, we think that each were bound

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to exercise that right in a fair and reasonable manner, and not so as to impede the others from doing the same.[1] There being a right, there must be a remedy, and we think that this suit, which sounds in case, is a proper mode of seeking that remedy. It is manifest that a suit, in the nature of ejectment, would not be applicable where the plaintiffs have not a several fishery of the territorial kind, nor would trespass lie for a mere disturbance of a common fishery; although it or trover might lie, if the fish were actually caught and in the possession of the plaintiffs and taken out of that possession by the defendants. In *Young* v. *Hichens*[2] the possession was not complete, and, therefore, the Court (Q. B.) held that trespass would not lie; but Lord Denman, C.J., in ruling that to be so, added: "It may be that the defendant acted unjustifiably in preventing the plaintiff from obtaining such power; but that would only show a wrongful act, for which he might be liable in a proper form of action." Here his Lordship was evidently pointing to an action on the case, for the maintenance of which possession of the fish would not be necessary, and an improper disturbance of the right would be sufficient. We agree in what Holt, C.J., said in *Keeble* v. *Hickeringill*[3] in illustrating his proposition that "he that hinders another in his trade or livelihood is liable to an action for so hindering him." After instancing that "scandalous words spoken of a man in his profession" are actionable, but when spoken of him without (*dĕhors*) his profession are not so, he proceeds to observe how much more the defendant ought to be so liable if he do "an actual or real damage to another, when he is in the very act of receiving profit by his employment. Now there are two sorts of acts for doing damage to a man's employment, for which an action lies: the one is in respect of a man's privilege; the other is in respect of his property. In that of a man's franchise or privilege whereby he hath a fair, market, or ferry, if another shall use the like liberty, though out of his limits, he shall be liable to an action, though by grant from the king. But therein is the difference to

(1) West, J., in 8 Bom. H. C. Rep. Cr. Ca. at p. 89, says:—"Thus the accused finding a particular space in the sea occupied by the Malavni fishermen, were bound so to pursue their own calling, if they could, as to leave their rivals without molestation."

(2) 6 Q. B. 606, 611; S. C. Davison and Mer. 592, 598, 599.

(3) 11 East *in notis*, pp. 574, 576.

be taken between a liberty in which the public hath a benefit, and that wherein the public is not concerned—22 H. 6. 14, 15. The other is where a violent and malicious act is done to a man's occupation, profession, or way of getting a livelihood: there an action lies in all cases. But if a man doth him damage by using the same employment: as if Mr. Hickeringill had set up another decoy on his own ground near the plaintiff's, and that had spoiled the custom of the plaintiff, no action would lie, because he had as much liberty to make and use a decoy as the plaintiff. This is like the case of 11 Hen. IV. 47. One schoolmaster sets up a new school to the damage of an ancient school, and thereby the scholars are allured from the old school to come to his new. (The action there was held not to lie.) But suppose Mr. Hickeringill should lie in the way with his guns, and fright the boys from going to school, and their parents would not let them go thither; sure that schoolmaster might have an action for the loss of his scholars—29 E. III. c. 18. A man hath a market, to which he hath toll for horses sold: a man is bringing his horse to market to sell: a stranger hinders and obstructs him from going thither to the market: an action lies, because it imports damage. Action upon the case lies against one that shall by threats fright away his (plaintiff's) tenants-at-will—9 H. VII. 8; 21 H. VI. 31; 9 H. VII. 7; 14 Edw. IV. 7: *vide* Rastal 662; 2 Cro. 423." The ruling in *Keeble* v. *Hickeringill*[1] was that an action on the case lies for discharging guns near the decoy pond of another with design to damnify the owner by frightening away the wild fowl resorting thereto, by which the wild fowl were frightened away and the owner damnified. *Carrington* v. *Taylor*[2] is to the same effect, the question put to the jury by the Judge on the trial and approved in Banc by the Court being whether the evidence showed a wilful disturbance of the plaintiff's decoy by the defendant. No doubt these cases, relating to decoys, involved a disturbance of the plaintiff's rights connected with their private property in the decoy, but still they are to a certain extent applicable here as relating to the capture of animals *ferœ naturæ*, which fish as well as wild fowl are. The observations of Holt, C. J., as to the case of the school in the Year Book 11 H. IV. 47 touch this case more nearly. It is quite true that where there are rival schools, or (as was observed by the Judges in the school case,) rival mills, the mere circumstance of competition, although it may be inju-

(1) 11 East. 574. (2) 11 East. 571.

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rious to the original school or original mill, confers no cause of action; but, as was remarked by Holt, C. J., a wilful prevention by the new schoolmaster of the exercise of his calling by the ancient schoolmaster would be actionable. Both are entitled to set up their schools and to use all fair means to attract scholars to them, but neither would be entitled to slander the other in his mode of carrying on his school, or wilfully to obstruct his pupils in attending it. For instance, if the new schoolmaster placed obstructions to the access of the old schoolmaster's pupils to the school of the latter, such conduct would be actionable. It would not be competition but prevention, partial or complete as the case might be, and such a molestation as the law would not permit. I asked the learned counsel for the defendants whether, if the defendants had placed one row of stakes immediately in front, and another row of stakes immediately behind those of the plaintiffs, such conduct, which would completely prevent them from exercising their equal right with that of the defendants to fish in the sea, would not be actionable, and he did not venture to deny that it would. There undoubtedly was room enough for both parties to fish off Yerangal, and they should exercise their right in such a manner as not to impede each other in so doing. What is a reasonable distance at which one party should fix their stakes from those of the other, so as not to impede the latter from fishing, may depend on many circumstances, *ex. gr.*, the strength with which the tide runs, the direction in which the fish usually run on the ebb or flood tide, the variety of the currents occasioned by the conformation of the shore or upon other circumstances, which should be the subject of careful inquiry. Independently of custom, if there be any conduct of one party towards the other which prevents the latter from a fair exercise of his equal right, and special injury thereby results to him (1), such conduct is actionable. There appears to be no good reason why the principle, *sic utere tuo ut alienum non lædas*, should not be applied to rights as well as to property. There is a very great difference between fair competition and wilful prevention. We do not, and cannot, in the absence of evidence, attempt to form an opinion

(1). *Maynell* v. *Saltmarsh* 1 Keble. 847; *Hart* v. *Bagsett*. Sir T. Jones 156. *Chichester* v. *Lethbridge*, Willes' Rep 71. *Iveson* v. *Moore* 1 Ld Raym 486. S. C. 12 Mod. 262; *Greasly* v. *Codling* 2 Bing. 263; *Rose* v. *Miles* 4 M. & S. 101; *vide* per Kelly C. B. L. R. 2 Ex. 322. 1 H & N 369 *et vide Satku* v *Ibrahim*, Infra pp. 457-460-467 *et seq* and *Gehanaji* v. *Ganpati*, infra p. 469.

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whether the distance of 120 feet, at which the defendants have set up their second row of stakes, is, having regard to such circumstances as above indicated, an unfair obstruction of the plaintiffs' right of common fishery. That is a matter of evidence. The defendants had already one row of stakes to the northward of those of the plaintiffs, and the setting up of another row to the southward of the plaintiffs' stakes, so nearly as 120 feet from them, wears the aspect of an intention on the defendants' part not to give fair play to the plaintiffs. Further, the plaintiffs have alleged a custom of not placing rival stakes at a less distance than 600 feet from each other. If this custom be established, and a breach of it by the defendants, and injury from that breach, this action would be sustainable. In the whale fisheries, in the northern and southern seas, customs prevail, and the Courts have gladly recognized those customs,(1) and for good reasons. Some of these may be gathered from the remarks of Chambre, J., in *Fennings* v. *Lord Grenville*.(2) The point on which the case (which arose in the southern whale fishery) turned, is not material here; but Chambre, J., said: "I should have been very unwilling to grant a new trial, if the only question had been on the custom. There must of necessity be a custom in these things to govern the subjects of *England* as well amongst themselves as in their intercourse with the subjects of other countries. The usage of *Greenland* is held to be obligatory not only as between British subjects, but as between them and all other nations. I remember the first case upon that usage which was tried before Lord *Mansfield*, who was clear that every person was bound by it, and said *that were it not for such a custom, there must be a sort of warfare perpetually subsisting between the adventurers*; and he held it strongly binding, from the circumstance of its extending to different nations. The same necessity must prevail in the *South Seas*, although the fishery has not been so long in use, in order to regulate our intercourse with the *French*, *Americans*, and others who resort thither."

The customs of the whale fisheries would not afford much or any assistance in such a case as the present, where the mode of

(1) *Hogarth* v. *Jackson*, Moo. and Mal. 58; 2 C. and P. 595; *Skinner* v. *Chapman*, Moo. and Mal. 59, note; *Littledale* v. *Scaith*, 1 Taunt. 243, note *Aberdeen Arctic & Co.* v. *Sutter*, 4 Macq. H. L., 355.

(2) 1 Taunt. 241, 248.

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fishing and the fish are so different. But the principle of the recognition of custom as regulating sea fishing is valuable. The remarks of Lord Mansfield quoted by Chambre, J., are especially so and very applicable here. If there be not some usage, we are at a loss to conceive how difficulties in conducting the system of stake fishing, which prevails along the Malabar Coast, are not of much more frequent occurrence than they are, for it is very clear that too great proximity of the stakes to each other would be disastrous to the trade, costing much money, as those stakes (which are often of very considerable length) and the fixing of them do. It can scarcely be that the fishermen along the coast have not some understanding amongst themselves as to what is a fair and proper distance at which the rows of stakes should be fixed from each other. The expense and trouble of frequently raising the stakes, and refixing them elsewhere, whenever any person chooses to lay down a new row near existing stakes, would be too intolerable to be long submitted to. The system of stake-fishing along this coast is very ancient. In the map of Bombay attached to Fryer's Travels, published A.D. 1698, fishing stakes are marked as existing in the same locality in which some are still planted. It has not been contended that the plaintiffs' stakes interfere with navigation, and the system is too long established, and permitted as one of the most ordinary modes of sea-fishing, to be regarded with the jealousy with which stake-fishing is viewed by the English Law, which deems stake-fishing a private mode of fishing inconsistent with a common fishery.[1] Moreover, the stakes are alleged to be shifted at particular seasons, and cannot be regarded as giving a title to the parts of the soil in which they are from time to time planted, as Lord Hale seemed to think was the case in England,[2] from which opinion Mr. Hall expresses his dissent.[3]

For these reasons we think that this suit will lie. We reverse the decree of the District Judge and remand the cause for a new trial on the merits. Costs of suit and of this appeal must abide the final result of the cause.

(1) Hall's Sea Shore, pp. 50, 51, 2nd Ed.

(2) De Jure Maris, Harg. L. T.; Hall's Sea Shore, Appx., pp. XV, XVI, 2nd Ed.

(3) Hall's Sea Shore, p. 55, 2nd Ed.

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It will be desirable that, if it be necessary, and the plaintiffs be so advised, they should be permitted to amend their plaint by stating therein the general custom of the coast, if any, as to the distance at which rows of fishing stakes are usually placed from each other. The custom, if any, may possibly vary in different places according to local circumstances.

The District Judge should permit the parties to give such evidence as to local or coast customs as they can procure or as may in other respects be necessary or may elucidate the case.

It is our strong recommendation to the parties, and we desire that the same may be conveyed to them respectively, that, if they cannot, as they ought, come to a fair settlement between themselves, they should refer the matter in dispute to the arbitration of some gentlemen of experience, who are cognizant of the mode of stake-fishing along the coast, and should not harass and exhaust each other by further litigation. If, however, they do not take this reasonable course, they should recollect that it is certain that the law is capable of compelling them to exercise their common right fairly towards each other, and not in a spirit of malice or rapacity.

Decree reversed and case remanded.

[CROWN SIDE.]

Before Sir M. R. Westropp, Knight, Chief Justice, Sir Charles Sargent, Knight, Justice, and Mr. Justice Atkinson.

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July 7.

IMPERATRIX *v.* PITÁMBER JINA.

Evidence—Confession—Indian Evidence Act (I of 1872), Sections 25 and 167—High Court's Criminal Procedure Act (X of 1875), Sections 23 and 101—Letters Patent, 1865, Clause 25—Power of the High Court on a point of law reserved to consider the merits of the case.

Section 25 of the Indian Evidence Act (I of 1872) does not preclude one accused person from proving a confession made to a police officer by another accused person tried jointly with him.

Such a confession is not to be received or treated as evidence against the person making it, but simply as evidence on behalf of the other.

The High Court, on a point of law, as to the admissibility of rejected evidence, reserved under Clause 25 of the Letters Patent, 1865, and Section 101 of the High Court's Criminal Procedure Act (X of 1875), has power to review

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the whole case, and determine whether the admission of the rejected evidence would have affected the result of the trial, and a conviction should not be reversed unless the admission of the rejected evidence ought to have varied the result of the trial (Indian Evidence Act, Sec. 167).

RANCHORDÁS WALJI and Pitámber Jina were tried at the third Criminal Sessions in 1877 for the murder of Pragji Dhunji.

Inverarity, who appeared for the second prisoner, Pitámber Jina, at the commencement of the trial, asked that the prisoners should be tried separately.

Marriott, Advocate-General (Acting), on behalf of the Crown, objected to this course, and the application was refused by the presiding Judge (Atkinson, J.), and the prisoners were tried together.

It was proved that the prisoners had gone together, on the day before the murder, to select and purchase the knife with which the murder was committed, and on the night of the murder had driven, in company with the murdered man, in a bullock cart to a spot at a short distance from the place where the murder was committed, that all three had there dismounted and walked away together, that after an interval the first prisoner returned alone, and getting into the cart desired to be driven back, that the cart-driver, noticing stains of blood on the sleeves of his passenger, suspected something was wrong, and accordingly, on reaching a police-station on the road, stopped and gave information to the police which resulted in the discovery of the murder and the apprehension of the two prisoners.

Inverarity, in cross-examining the cart-driver, who was one of the witnesses for the prosecution, wished to ask whether, while the first prisoner was seated alone in the cart, the witness had not heard a policeman ask the first prisoner what he had done, and the first prisoner reply "I have killed a man, and the other has run away."

Gill, for the first prisoner, objected to the question.

Marriott, for the prosecution, also objected, and the learned Judge ruled that the question could not be put.

The jury eventually, on 5th July 1877, returned a verdict of guilty against both prisoners. Atkinson, J., however, on the motion of Inverarity, for the second prisoner, under Clause 25 of the

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Letters Patent, 1865, and Section 101 of the High Court's Criminal Procedure Act (X of 1875), reserved, for the decision of two or more Judges of the High Court, the question, whether the evidence of the first prisoner's confession had, under the circumstances above stated, been rightly excluded.

Inverarity, on the point reserved :—The question which I proposed to put to the cart-driver was intended, not to criminate the first prisoner, but to exculpate the second ; the confession, therefore, which that question sought to establish, did not come within Section 25 of Act I of 1872. That section would no doubt prevent the counsel for the prosecution putting the proposed question, but would not prevent the counsel for one of two co-prisoners putting it, for his object would be, not to use the confession against the person making it, but in favour of the other. Had the prisoners been tried separately, no objection could have been taken to to the counsel for the second prisoner asking a question for the purpose of establishing an admission by the first prisoner that it was he who had committed the murder. A question which, if the two prisoners had been tried separately, would have been admissible, cannot be rendered inadmissible by the mere fact of their being tried jointly. If this question, admissible had the prisoners been tried separately, were inadmissible at their joint trial, then the learned Judge was wrong in refusing the application for a separate trial, and I shall move in arrest of judgment on that ground if the question be now held inadmissible.

Marriot, Advocate-General (Acting), for the Crown, referred to Sections 23 and 101 of Act X of 1875, and argued that the decision of the Judge, that the prisoners should be tried jointly, being absolutely final, and his power to reserve a question being limited to the reserving of a point of law arising in the course of the trial, the determination of which would have affected the result, the Court could not now consider whether or not the proposed question was admissible because it would have been so in a separate trial, or whether or not there should be a separate trial. The proposed question was inadmissible at the joint trial, because the object of it being, by means of the first prisoner's own admission, to throw the blame on him, and thus clear the second prisoner, it attempted to prove the first prisoner's confession as against him. Moreover, the admission of the rejected evidence would not, in fact, have affected the event of the trial.

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WESTROPP, C.J.:—We are unanimously of opinion that the question which Mr. Inverarity proposed to put to the cart-driver Bálá Rámji, in cross-examination, was, under the circumstances, admissible. On hearing the arguments, we have come to the conclusion that Section 25 of the Indian Evidence Act (I of 1872) does not preclude the counsel for one accused person on behalf of his client asking questions to prove a confession made by another accused person. But under such circumstances it would be the duty of the Judge to instruct the jury that such confession is not to be received or treated as evidence against the person making it, but simply as evidence to be considered on behalf of the other. We also think that, unless the law were so, the accused person who was on his trial with the confessing party, might be considerably prejudiced by the exclusion of that evidence. The 25th section only provides that "no confession made to a police officer shall be proved as *against* a person accused of any offence." In this case the confession was sought to be proved not as *against* either the confessing person, or his co-accused, but on behalf of the latter. There is not anything, of which we are aware, in the Indian Evidence Act, to which Act alone (Sec. 2) we are at liberty to look for the law of evidence in this country, that would justify us in excluding such evidence when sought to be given *on behalf* of the co-accused, provided it be relevant. It may be said that it is a matter of difficulty for a jury to give to the latter accused the benefit of such evidence, and not to permit it to prejudice in their minds the confessing party. But the Court is not to presume that the jury will disobey the direction of the Judge (whose duty it is to instruct the jury as to the law), when he tells them, as he should do, that the confession made to a police officer is not to be regarded as evidence against the accused who made it. That accused would have the protection of the direction, whereas, if the confession were wholly excluded, the co-accused might suffer serious injury and would be absolutely helpless. The value of the confession, as a circumstance in his favour, may be great or small. That is a matter to be weighed by the jury. When a judge, on perusing the depositions before trial, perceives that such a confession, by one accused, is likely to be offered in evidence on behalf of another accused, it would be an important matter for his consideration whether it would not be desirable to direct that the accused persons should be separately tried.

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Inverarity then submitted that the question now ruled admissible, having been rejected by the learned Judge who presided at the trial, the conviction must be quashed, as the Full Court had no power to go into the evidence for the purpose of seeing whether the event of the trial had or had not been affected by the rejection of the question. Section 167 of Act I of 1872 refers to the Court originally trying the case, and the expression "the court" in that section, in a case tried by a jury, means the judge and the jury. In such a case it is the judge and the jury who have to decide whether the result would have been different had the rejected evidence been received; but the jury who tried this case having been discharged after returning their verdict, it is impossible now to obtain the decision of "the court who tried the case" on the question whether the result of the trial would have been different if the rejected evidence had been admitted, and it is not competent for the Full Court to go into the merits and pass a decision now. There has been a difference of opinion on this point in both the High Courts of Bombay and Calcutta: *Regina* v. *Navroji*,[1] *Regina* v. *Hurribole*.[2]

WESTROPP, C.J.:—We are of opinion that we now have, as was ruled by the majority of the Court in each of the two cases cited by the learned counsel for the prisoner, power to review the whole case, and determine for ourselves whether, if the rejected question had been admitted, the result ought still to have been the same. Apart from those two cases, *i.e.*, if the question were now raised for the first time, we think that, by Clause 26 of the Letters Patent, 1865, and Section 101 of the High Court's Criminal Procedure Act (X of 1875), the power of so reviewing the whole case, on a point of law such as the admissibility of rejected evidence when reserved, is expressly conferred on this Court. We are clearly of opinion that Section 167 of the Indian Evidence Act, 1872, is applicable to criminal as well as to civil cases, and is so to criminal cases, whether or not the trial has been had before a jury, and that the expression in that section "the Court before which such objection is raised," includes the reviewing or Appellate Court. That the 167th section applies to criminal as well as to Civil Courts is, we think, satisfactorily established by the 1st section, which renders the Act applicable "to all judicial proceed-

(1) 9 Bom. H. C. Rep. 358 (2) I. L. R., 1 Cal. 207.

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ings in or before any Court, including Courts Martial," with certain exceptions not material in this case; and by the 3rd section, which declares that the word "Court" includes all judges and magistrates.

Inverarity then went into the merits of the case with the view of showing that, had the first prisoner's confession been before the jury, they would not have returned a verdict of guilty against the second prisoner.

WESTROPP, C.J.:—The question which Mr. Inverarity, as counsel for the second prisoner, proposed to put, and which we have ruled might have been admitted, was "whether the policeman did not ask the first prisoner in the bullock cart a question, and did not the first prisoner reply 'I have killed a man on the Vellard, and the other has run away'?" The learned Judge, if he had admitted this evidence, would have been bound to tell the jury that it was not evidence against the first prisoner; but we are of opinion that he should have directed the jury to take that evidence into consideration as regarded the second prisoner. That, however, would, we think, in this instance, have left the case in precisely the same condition. Suppose the first prisoner did say "I killed the man," still he said nothing expressly exonerating the second prisoner. The jury came to the conclusion that the prisoners had acted in concert in the murder of the deceased. The rejected evidence might have proved that the blow was actually struck by the first prisoner, but it did not affect the question whether the second prisoner was acting in concert with him, and the conviction and sentence should not be reversed unless the admission of the rejected evidence ought to have varied the result of the trial. The admission of this evidence could not properly have varied the result in any respect. Under these circumstances we must allow the conviction to stand, it being in our opinion perfectly consistent with all the evidence which bears on the second prisoner.

Conviction affirmed.

[APPELLATE CIVIL JURISDICTION.]

Before Sir M. R. Westropp, Knight, Chief Justice, and Mr. Justice West.

BHALA NAHANA (PLAINTIFF, APPELLANT) *v.* PARBHU HARI (DEFENDANT, RESPONDENT).* 1877 June 7.

Talabda Koli caste—Adoption—Hindu Law—Contract to settle—Specific performance—Alienation of immoveable property by Hindu widow—Limitation.

It is not a necessary consequence of the circumstance that the spiritual motive for adoption, which exists amongst the higher castes of Hindus, has no influence upon the Talabda Koli caste, that its members may not lawfully adopt.

Where a member of the Talabda Koli caste of Hindus, by an express promise to settle his property upon the boy, induced the parents of the defendant to give him their son in adoption, but died without having executed such settlement,

Held that the equity to compel the heir and legal representative of the adoptive father specifically to perform his contract, survived; and the property in the hands of his widow was bound by that contract.

Therefore, when the widow of the adoptive father, nearly thirty years after his death, gave effect to his undertaking by executing a deed of gift of his property in her hands in favour of the adopted son,

Held that such alienation was valid as against the next heir by blood of the adoptive father, and he could not, on the death of the widow, avail himself of the plea of limitation which she had waived.

The nature of a Hindu widow's estate in immoveable property considered.

THIS was an appeal from the decision of H. Birdwood, District Judge of Surat, affirming with costs the decree of the 2nd Class Subordinate Judge at Ankleswar, whereby he dismissed the plaintiff's suit with costs.

The parties to this suit were Talabda Kolis.

The plaintiff as brother's son, and next heir, according to Hindu Law, of one Gosái Rámji, sued, in 1875, to recover from the defendant, who was a sister's son of Gosái Rámji, possession of a house and land in the village of Obha. Gosái Rámji, who was the divided brother of the plaintiff's father, died intestate and without issue about thirty years before the institution of this suit, leaving him surviving his widow, Bháni, who died on 29th September 1873, which was the date alleged by the plaintiff as that of the accrual of his cause of action, and the plaintiff contended that he thereupon became entitled to succeed to the property left by Gosái Rámji.

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The defendant alleged that he had been adopted, according to the custom of the Talabda Koli caste, by Gosái Rámji, and also relied on a deed of gift executed in his favour by Bháni shortly before her death. He also pleaded limitation.

The evidence showed that Gosái Rámji and Bháni requested the defendant's parents to give the boy to them, as they were childless; that the defendant's father replied "Take him, since you are childless"; that Gosái Rámji promised that the whole of his property should belong to the boy, and also agreed to execute a deed of gift in his favour; and that, but for such promise and agreement on the part of Gosái Rámji, the parents of the defendant would not have consented to give him their son. It was also proved that ever since this compact, which was made in his infancy, the defendant had lived with Gosái Rámji, and been treated by him in all respects as his son; that Gosái Rámji had defrayed the expenses of the marriage of the defendant; and that, when the defendant's father died, the defendant's brother succeeded alone to the whole of his property.

The defendant admitted that he had never assumed Gosái Rámji's name, or performed the funeral ceremonies either of Gosái Rámji or Bháni, and that he still continued to observe the periods of mourning for the deaths of his own blood relations. This, however, was accounted for by the fact that adoption, in the sense in which the word is generally used in the Hindu Law, is unknown to the Talabda Kolis, amongst whom boys are taken as sons, not for any spiritual purpose, but for temporal only; and are, consequently, ineligible for the performance of the funeral obsequies of their adoptive parents, and are forbidden to call the adopter "father."

The 2nd Class Subordinate Judge found the plea of limitation in favour of the plaintiff. He also held that the mere taking of the boy, in the manner and for the purposes above stated, did not constitute such an adoption as would, according to the Hindu Law, entitle the defendant to inherit the property of Gosái Rámji. He also held that there was not sufficient evidence to warrant him in finding that Gosái Rámji had expressly authorized his wife to make such a disposition of his property in favour of the defendant

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as she afterwards did by the deed of gift. But he held that, inasmuch as Gosái Rámji had induced the defendant's parents to give him their son, and thereby materially affect the boy's *status*, by his promise to execute a deed of gift in favour of the defendant, and had died without having executed that deed, but without having shown any wish to retract his promise, the alienation by the widow was a proper one according to Hindu Law, and must be supported as a disposition made for the purpose of giving effect to the wishes of her husband, who, as a divided Hindu, had a right to deal with his property as he pleased. The District Judge, in appeal, affirmed this decision on the same grounds, and the plaintiff thereupon preferred this special appeal.

Nagindás Tulsidás for the appellant.

Goculdás Parekh for the respondent.

The judgment of the Court was delivered by

WESTROPP, C.J.:—It is not a necessary consequence of the circumstance that the spiritual motive for adoption, which exists among the Hindus of castes higher or other than the Talabda Koli caste, has no influence upon it, that its members may not lawfully adopt. The celebrity or perpetuation of the name and family of the adopter is recognized as a motive for adoption. Datt. Mim., sec. 1, pl. 9; Datt Chand., sec. 1, pl. 3. For instance, adoption, though not frequent in the Jaina community of Hindus, is practised and recognized, notwithstanding that they disbelieve in the efficacy of and discard the *sraddha* or *paksha* ceremonies; their sole motive for adoption being the perpetuation of the name and family of the adopter: *Bhagvandás Tejmal* v. *Rajmal*.(1)

In the Subordinate Judge's Court the reasons for adoption in the Talabda Koli caste are found to be temporal, viz., the rendition by the adopted sons of domestic services, the commemoration, by those sons, of the adoptive fathers, by giving feasts on the anniversaries of their deaths to the caste, and that the adopted sons should become heirs of the adoptive fathers. In the present case there unquestionably has been a giving and receiving in adoption

(1) 10 Bom. H. C. Rep. 241; see pp. 261, 263.

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and it is found, as a fact, that the gift of the boy by his parents was made upon the express promise by Gosái Rámji, the adoptive father, to settle his property upon the boy. It has, indeed, been also found, as a fact, that an adoptive father may, according to the custom of the caste, for such reasons as would justify a natural father in disinheriting his son, repudiate the adopted son. It is, however, sufficient for us to say that not only is there a complete absence of allegation or evidence that any such grounds existed here, but Gosái Rámji, up to the time of his death, kept the boy in his house, treated him as his son, and never expressed any intention or desire to repudiate him, or to violate the promise on the faith of which the natural parents gave their boy in adoption. If any such grounds had existed, and the adoptive father had upon them repudiated the boy, it might be a question what would be the effect of such a repudiation upon the contract to settle, or upon the boy's right to resume his place in the family in which he was born, either as regards heirship or otherwise. It is unnecessary here to consider such questions. There not being any evidence of grounds which would have warranted repudiation, or any repudiation in fact, we must hold that Gosái Rámji was, at the time of his death, bound to perform his contract, on the faith of which the boy's natural parents permitted him to alter his *status* in life, and to forego his claim to inheritance from them. In *Hammersley* v. *Baron De Biel*[1] Lord Cottenham said:—"A representation made by one party for the purpose of influencing the conduct of the other party, and acted on by him, will, in general, be sufficient to entitle him to the assistance of this Court for the purpose of realizing such representation." And in the same case in the House of Lords, where his decision below was affirmed, he said:—"But the principle of law, at least, of equity, is this—that if a party holds out inducements to another to celebrate a marriage, and holds them out deliberately and plainly, and the other party consents and celebrates the marriage in consequence of them, if he had good reason to expect that it was intended that he should have the benefit of the proposal which was so held out, a Court of Equity will take care that he

(1) 12 Cl. and F. 45, 61, note.

is not disappointed, and will give effect to the proposal."(1) See to the same effect *Coverdale* v. *Eastwood*,(2) and the cases collected in 1 White and Tudor, 3rd Ed. 705, 4th Ed. 782. Gosái Rámji having died, without making the promised settlement, the equity to compel his heir and legal personal representative specifically to perform his contract, survived him. The property, when it came into his widow's hands, was bound by that contract. It has been relied upon on behalf of the plaintiff that the contract remained unperformed for some thirty years after the death of Gosái Rámji. That circumstance, however, is immaterial, inasmuch as his widow, who fully, so long as she lived and continued a widow, represented the inheritance (if the adopted son were not himself the heir), did not think proper to avail herself of any plea of lapse of time, but did, by the deed of settlement (Exhibit No. 9), carry her husband's contract into complete execution. Strictly speaking, however, the property of Gosái Rámji, on his death, vested in interest in the adopted son as his heir, who was then entitled to immediate possession, and the acts of the widow were merely for the purpose and had the effect of vesting that property in him in actual possession. She never, apparently, wavered in her purpose; for she had previously caused the *Gamatia* lands to be transferred to the name of the adoptive son, and had endeavoured to induce the Collector to transfer her deceased husband's share in the *Bhagdari* land also to the adoptive son's name. She was not in anywise bound to avail herself of the plea of limitation, *Tilakchand* v. *Jitamal*,(3) if such a plea were open to her. She honourably adhered to her husband's contract, and it is not competent for the person who, if Gosái Rámji had not adopted a son, would, on the death of the widow, have been Gosái Rámji's heir to set up such a plea, which has been, as we think, most properly waived by the widow. In saying that she was not bound to avail herself of that plea, we are not unmindful of a *dictum* in *Melgirápá* v. *Shiváppá*,(4) that payment of a time-barred debt of a deceased husband was not a sufficient purpose to support an alienation by his widow against his male heir. That *dictum*, however, does not appear to have been indispensable—the suit there having

(1) 12 Cl. and F. 78, 79. (2) L. R. 15, Eq. 121.
(3) 10 Bom. H. C. Rep., pp. 213 to 215. (4) 6 Bom. H. C. Rep., 270, A.C. J.

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been simply to recover possession, to which relief the Court held the plaintiff (the alleged male heir) not to be entitled, the alienation being good, at least, so long as the widow lived and continued in a state of viduity.[1] The case of *Grish Chunder Lahoory* v. *Koomaree Debea*, cited by Norton (2 L. C. 642) from 1 Calc. W. R. Misc. 23, only shows the liability of the widow to pay the debts of her husband, and does not in anywise support the proposition for which he quotes it, viz., that the payment of her husband's debt after it has been barred by limitation is not such a necessity as will support an alienation by her. In *Gopalnarain* v. *Mudoomutty*,[2] Couch, C.J., is reported as having said in the High Court at Calcutta that "the manager of a joint Hindu family has no power to revive a debt by acknowledgment, except as against himself." That remark was made with reference to Section 4 of Act XIV of 1859, and may, perhaps, be regarded as the Court's view of the construction of that enactment, and akin to the ruling that an acknowledgment signed by an agent is not sufficient to bring a case within that section.[3] It is another and different proposition to maintain that, if the manager of a Hindu family (*ex. gr.* a son or grandson of the deceased) pay a debt of his father or grandfather barred by the law of limitation, such manager would not be entitled to credit as against his coparceners for the amount, or that a widow paying such a debt of her husband could not support her act against his divided male heirs. Whether we should concur in the above-quoted remark of Couch, C.J., it is unnecessary now to consider. The difference between a promise to pay and an acknowledgment should not be forgotten.[4] We do not feel pressed by the distinction, taken in *Gopalnarain* v. *Mudoomutty*,[5] between an English executor and a Hindu manager or executor. Of the English executor Lord Lyndhurst says: "The debtor may at any time pay the debt; and even his executor may pay it in spite of the statute, and in that way satisfy, in his

(1) 1 Calc. W. R. 47, 69; 2 Mad. H. C. R. 393; 2 Bom. H. C. Rep. 313, 2nd Ed.

(2) 14 Beng. L. R. 21, 49.

(3) *Brudoolhoosun Bose* v. *Enaet Moonshee*, 8 Calc. W. R. 1 Civ. R.

(4) Indian Contract Act IX of 1872, Sec. 25, Cl. 3; *Raghoji* v. *Abdul Karim* (Sp. App. 303 of 1876) printed judgments of 1877, p. 74; *Chatur* v. *Talsi* (Sm. C. Court Ref. 73 of 1877) printed judgments of 1877, p. 237; *Nagindás* v. *Trikumdás* (Civ. Ref. 117 of 1877) printed judgments of 1877, p. 239; *Tilakchand* v. *Jitamal*, 10 Bom. H. C. R. 213, 214, 215.

(5) 14 Beng. L. R. 21, 49.

representative capacity, the conscience of his testator."[1] See to the same effect *Norton* v. *Frecker*,[2] per Lord Hardwicke; *Stahlschmidt* v. *Lett*;[3] *Hill* v. *Walker*,[4] where Wood, V. C., expressly states that a *dictum* to the contrary in *McCulloch* v. *Dawes*[5] is not law; and *Lowis* v. *Rumney*.[6] The religious law of the Hindu widow, which is even more urgent than the moral obligation of the English executor, enjoins upon her the duty of paying the debts of her husband if he be not a member of an undivided family. The Rishi Narada says:—"The debts contracted by the husband shall be discharged by the widow, if sonless, or if her husband has enjoined her to do so on his death-bed, or if she inherits the estates; for whosoever takes the estate must pay the debts with which it is incumbered."[7] The answer of the Shastri, in 1 West and Bühler 68, is to the same effect. And East, C.J., in *Gopeymohun Thakoor* v. *Sebun Cower*,[8] remarked that "it is her duty to pay off the mortgage debt, as well as all other debts of her husband, provided there are assets, either real or personal." If the adopted son be not himself regarded as the heir of his adoptive father, but merely as a person upon whom the latter had contracted to settle his property, then the alleged adoptive father, having died sonless, divided from his kinsmen, and without having performed his contract, his moveable and immoveable estate completely vested in the widow by way of inheritance,[9] although with a restriction on her power of alienation of immoveable property,[10] except for certain proper or necessary purposes specified by Hindu jurists. Amongst these, as we have seen, the payment of her husband's debts and performance of his contracts are included. She so completely represents the inherit-

(1) *Williamson* v. *Naylor*, 3 Y. and C., Exch. 211, note.

(2) 1 Atk. 525, 526.

(3) 1 Sm. and Giff. 415.

(4) 4 Kay and Johns 166, 168, 169.

(5) 9 Dowl. and Ry. 43.

(6) L. R. 4, Eq. 451.

(7) Dr. Jolly's Trans., p. 17, pl. 18. That the same religious duty is incumbent on the son and grandson, see 11 Bom. H. C. Rep., pp. 83 to 85.

(8) 2 Morley Dig. 105, 111.

(9) *Vide* per Peel, C.J., in *Hurrydoss Dutt* v. *Rungunmoney Dossee*; 2 Taylor and Bell 280, 281, and per Colvile, C.J., in *Sreemutty Jadoomoney* v. *Sarodaprosono Mookerjee*; 1 Boulnois R. 129; *Doe d. Muddoosoodun Doss* v. *Mohenderlal Khan*, per Sir C. Jackson, J.; 2 Boulnois R. 42; and *Doe d. Goluckmoney Doss* v. *Diggumber Dey*; 2 Boulnois R., per Peel, C.J., p. 193.

(10) She may be restrained from waste. 1 Taylor and Bell 370; 2 Taylor and Bell 279; 2 Boulnois 201, per Peel, C.J.

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ance, that in a suit (in which she is a defendant) to foreclose a mortgage made by him, his next male heir is not a necessary party, although he has sometimes been made so *ex majori cautelâ*.[1] In *Doe d. Goluckmoney Dabee* v. *Diggumber Dey*,[2] Peel, C.J., observed: "It has been invariably considered for many years that the widow fully represents the estate; and it is also the settled law that adverse possession, which bars her, bars the heir also after her, which would not be the case if she were a mere tenant for life, as known to the English Law; on the contrary, if such were her estate, her heir would have twenty years after her death for making his entry, which would be a most mischievous rule to establish." The completeness of her title to the inheritance is further illustrated by the same learned Judge's observations and those of Colvile, J., in *Mohar Ranee Essadah Bái* v. *The East India Company*,[3] and the other cases mentioned in *Lalchand Ramdyal* v. *Gumtibái*,[4] and there quoted at pp. 155 to 157 of the report in 8 Bom. H. C. Rep., O. C. J. In *Ramchandra Tantra Dás* v. *Dharmo Náráyen Chuckerbutty*[5] it was held by a Full Bench in Calcutta that the interest of an heir, expectant on the death of a widow in possession, is so mere a contingency, that it cannot be regarded as property, and, therefore, was not liable to attachment and sale under Section 205 of Act VIII of 1859.

It follows, from what has been said, that we think the widow had full power to perform the contract of her husband with the parents of the adopted boy.

For these reasons we affirm the decree of the District Court with costs.

Decree affirmed.

(1) 2 Morley's Dig. 111, per East, C.J.; and also in *Cossinaut Bysack* v. *Hurrysoondry Dossee*, Ibid. 210, 215, as to which case, on appeal to the Privy Council, see 2 Boulnois R. 197, 198, per Peel, C.J., and 1 Boulnois R. 129, per Colvile, J.; and the Shiva Gunga case, per Turner, L. J.; 9 Moore, Ind. App. 604.

(2) 2 Boulnois R. 198; and *Nobinchunder* v. *Issurchunder*, 9 Calc. W. R. 505, Civ. R.

(3) 1 Taylor and Bell 290.

(4) 8 Bom. H. C. R. 155 to 157, O. C. J.

(5) 7 Beng. L. R. 341.

[ORIGINAL CIVIL.]

Before Mr. Justice Green.

DHANJIBHAI BOMANJI GUGRAT (PLAINTIFF) *v.* NAVAZBAI AND OTHERS (DEFENDANTS).* 1877 March.

Parsis—Distribution—Advancement—Statute of Distribution (22 & 23, *Car. II, C.* 10), *Section* 5—*Indian Succession Act* (*X of* 1865), *Section* 42—*Parsi Succession Act* (*XXI of* 1865), *Section* 8—*Administration—Limitation—Liability of the share of one of the next of kin for a debt due by him to the intestate, but barred at the date of the death of the latter—Cause of action—Claim against estate of intestate on account of moneys paid after his death for the surviving members of his family—Married woman—Separate property.*

In excluding by Section 8 of the Parsi Succession Act, from application to Parsis, Section 42 of the Indian Succession Act, which repeals the English rule as to advancement contained in the Statute of Distribution, Section 5, it was not the intention of the Legislature to preserve the last-mentioned rule in force for the Parsi community.

Semble that the rule followed by the Courts of Equity in England, whereby, notwithstanding the provisions of the Statutes of Limitation, the share of one of the next of kin in the esstate of an intestate, while in the hands of the administrator, is liable for a debt due by the next of kin to the deceased, though barred at the date of the death of the latter, is to be applied in the Courts of British India. The rule laid down in *Graham* v. *Londonderry* (3 Atk. 393), with regard to a husband's rights over ornaments, given to his wife by her father, applied to Parsis.

BOMANJI MANCHERJI GUGRAT, a Parsi, died intestate at Bombay, where also all his property was situate, on 15th February 1870, leaving him surviving, his sole heirs and next of kin, his widow Navazbái, the first defendant, and three sons, Dhanjibhai, the plaintiff, Mancherji, the second defendant, and Framji, the third defendant. Letters of administration were granted to the widow, Navazbái, on 11th February 1874. On 8th October 1875 the plaintiff filed this suit for the administration of the estate and effects of the deceased, and praying for an injunction to restrain the first defendant from dealing with or intermeddling with the estate, and for the appointment of a receiver.

In this suit the plaintiff also sought to render the estate of the intestate liable for certain sums, alleged by the plaintiff to have been paid out of his own moneys, after the death of the

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intestate, for the household expenses of the widow and two younger sons of the intestate; and to recover from the widow, as administratrix, possession of a Government promissory note of the 4 per cent. loan for Rs. 700, which the plaintiff alleged he had deposited with the intestate for the purpose of defraying the funeral expenses of the plaintiff's wife, who was still alive at the date of the institution of the suit; and also possession of certain ornaments, purchased by the intestate for the wife of the plaintiff out of the proceeds of another Government promissory note of the 4 per cent. loan, previously deposited by the plaintiff with the intestate for the same purpose as the Rs. 700 note. On these minor points the learned Judge held that the moneys paid, after the death of the intestate, for the household expenses of his family, could not be charged to the estate, in the absence of any special agreement or testamentary provision to that effect, but could only be a debt due in their individual capacity by the members of the family for whom such moneys were so paid. As to the ornaments, the learned Judge held, following *Graham* v. *Londonderry*,[1] in the absence of any rule applicable to Parsis other than the English Law, that they were the separate property of the wife of the plaintiff, and that he had no right to ask to have them delivered to him. As to the promissory note for Rs. 700, the learned Judge held that the plaintiff could, on his own showing, have no right in it till after the death of his wife, and that there being no allegation that the note was not secure, there was no reason for changing its custody. There were, however, two points of law raised in the course of the case: 1st, as to the application to Parsis of the English rule relating to advancement; and, 2nd, as to the application of the Indian Limitation Act as a bar to the right of an administrator to deduct from the share of one of the next of kin in the estate of an intestate the amount of a debt due by that next of kin to the intestate, but barred at the date of the death of the latter.

The plaintiff by his plaint alleged that, at the time of the death of the intestate, the defendant Mancherji was largely indebted to the intestate, but to what precise amount the plaintiff was unable

[1] 3 Atk. 393.

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to say, and that no steps had been taken by the defendant Navazbái to recover such debt, the defendant Mancherji contending that the same was barred by limitation. The plaintiff, therefore, submitted that the amount of such debt, when ascertained, ought to be deducted from the share of the defendant Mancherji in his father's estate.

The following were the further issues raised on this question :—

2. Whether at the death of Bomanji Mancherji, the defendant Mancherji Bomanji was indebted to him in any, and what, amount.

3. Whether, in case there was at any time any such debt, the same had not, at the death of the said Bomanji Mancherji, become barred by the Limitation Act.

5. Whether the share of the defendant Mancherji Bomanji in the estate of Bomanji Mancherji is subject to any, and what, deduction, by reason of any advancement made to him by the said intestate during his life-time.

The facts material to this report, on the points above mentioned, are stated at length in the following extracts from the judgment.

Gill and *Jardine*, for the plaintiff:—It is settled that Parsis are generally, and in the absence of any rule to the contrary, governed by English Law. Therefore, previously to 1865, there can be no doubt that they would have come under the English rule as to advancement contained in the Statute of Distribution. That rule is repealed by Section 42 of the Indian Succession Act (X of 1865); but Section 8 of the Parsi Succession Act (XXI of 1865) expressly provides that Section 42 of the Indian Succession Act shall not apply to Parsis, and the Statute of Distribution is not repealed by the Parsi Succession Act. The English rule, as to advancement, therefore, applies to Parsis, and this case must be governed by the English cases on the point: *Gilbert* v. *Wetherell*, (1) *Auster* v. *Powell*,(2) *Boyd* v. *Boyd*.(3)

As to the point of limitation, the share of a legatee or next of kin in the hands of an executor or administrator is subject to

(1) 2 Sim. and St. 254. (2) 1 DeG. J. and Sm. 99.

(3) L. R. 4 Eq. 305.

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deduction of the amount of a debt due by such legatee or next of kin to the testator or intestate, though the debt be barred at the time of the death of the testator or intestate: *Courtenay* v. *Williams*,(1) *In re Cordwell's Estate*.(2)

Pigot and *Lang*, for the defendants:—The whole scheme of distribution contained in the Statute of Distribution is, so far as Parsis are concerned, abrogated by the Parsi Succession Act. It is, therefore, idle to suppose that a single section of the statute is to be kept alive for the Parsis only, while the whole of the rest of the statute is, in effect, repealed by the Parsi Succession Act, and this section by the Indian Succession Act. It was not thought necessary expressly to repeal the rules contained in the Statute of Distribution by the Parsi Succession Act, because in that Act was laid down an entire scheme of distribution wholly different from that contained in the statute. The Act must, therefore, be held to have taken the place of the statute; and as there is nothing in the Act equivalent to the English rule of advancement, that rule cannot be held to apply to Parsis. The rule was expressly repealed in the Indian Succession Act, because that Act contains many provisions similar to those of the English Law, and is not, like the Parsi Succession Act, a wholly different and independent law.

The cases cited on the point of limitation do not apply, because in India the Limitation Act is binding on all the courts. In England the Courts of Equity, when they apply the provisions of the Statutes of Limitation, do so by analogy only, not because they are bound by them. Hence it is that in England a Court of Equity will sometimes, as in the cases cited, give relief where the Courts of Law, which are bound by the Statutes of Limitation, would be compelled to refuse it, and in other cases will refuse it, though a Court of Law would not, because it is not barred by the letter of the statute. But in India the Limitation Act is binding on all courts alike, and must be applied to all cases.

The following judgment was delivered on the issues not already disposed of as aforesaid:—

(1) 3 Hare 539. (2) L. R. 20 Eq. 644.

GREEN, J. :—The 2nd, 3rd, and 5th issues may conveniently be considered together. The plaintiff did not, before the hearing, put in the form of any definite or tangible allegation what the debt of the defendant Mancherji Bomanji to the intestate was. In his plaint he merely says that the said defendant was largely indebted to the intestate. When called upon by summons in chambers to give some particulars of this alleged debt, he professed to be unable to do so. His case, as generally put forward in the first instance at the hearing, was that, at or about the time of the dissolution on the 11th November 1863 of a partnership of Govind Hari Walekar & Co. (in which the intestate, one Govind Hari, and others were partners), the defendant Mancherji Bomanji and Govind Hari (in the name of his infant son Hari Govind) had large transactions in purchasing and shipping cotton together on joint account, the share of Mancherji Bomanji in the capital embarked in such transactions being provided by crediting Hari Govind with certain sums and debiting the same against the large balance of some 80,000 or 1,00,000 rupees due to the father Bomanji Mancherji from the dissolved firm of Govind Hari Walekar & Co.; and that the amount of such sums was to some extent established by the balance of the accounts in the name of Mancherji Bomanji in the intestate's books, viz., Exhibits A, B, and C; that balance, as appearing on such accounts, being, on 20th October 1865, the sum of Rs. 84,540-0-89. The plaintiff, however, does not seek to charge the defendant Mancherji Bomanji with the whole of this sum. He contends that from the sum of Rs. 84,540-0-89 is to be deducted the sum of Rs. 23,505-8-8, appearing, as he contends, by one of the accounts marked D, to have been Mancherji's share of the loss in the transactions on joint account of Mancherji Bomanji and Govind Hari (as Hari Govind), that this share of loss ought to be borne by the defendant Mancherji, or, in other words, is the debt he owes to his father's estate, and that the balance of the Rs. 84,540-0-89 ought to be borne or accounted for by the three brothers, viz., the plaintiff, Framji, and Mancherji, in equal shares. I was unable to understand on what principle the plaintiff arrived at this result, but such as I have given it his contention was in giving his evidence. The plaintiff's counsel in reply, however,

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contended, and this contention is one that is in itself quite intelligible, that as it appeared from the evidence given on behalf of the defendants that Bomanji Mancherji, in his life-time, dealt for his own purposes with Rs. 75,000 of the balance due to him on account of his share in the partnership of Govind Hari Walekar & Co., viz., by taking shares to that extent in a certain trading company established in 1864 by Govind Hari and others under the name and style of the General Trading Company, and giving credit for that sum, as of 24th August 1864, to the firm of Hari Govind, the liability of the defendant Mancherji to his father was measured by the difference between Rs. 84,540-0-89 and Rs. 75,000, or Rs. 9,540-0-89. This, then, was the final form which the plaintiff's allegation of a debt due by the defendant Mancherji to his father assumed.

The defendant Mancherji Bomanji, however, contends that, even supposing (which he denies) that there was any debt at all due by him to his father, such debt was already barred at his father's death, on 15th February 1870, by the Limitation Act. The only dates of the alleged advances by the father, which we have in evidence, are those in Exhibits A, B, and C. Now the last item in date, except interest and balance, to the debit of the account of Mancherji Bomanji in any of those accounts, is under date 1st March 1865, and is described as a cheque for Rs. 5,000 drawn by Maneckji Limji & Co. upon the Chartered Bank and given to Mancherji Bomanji. This would be a claim for money lent, and would be barred by non-suit for three years.

All the other debit items (except for interest and balances) in the account, Exhibits A, B, and C, are of dates more than six years before the intestate's death. There is no statement of account and ascertainment of balance with the concurrence of the defendant Mancherji Bomanji alleged in evidence, which might, under the then Law of Limitation, have given a period of six years from the time of stating such account and admission of such balance, so that if we are to consider the balance appearing in the Exhibits A, B, and C, to the debit of the person named Bhai Mancherji Bomanji, to have been sums in truth then due by the defendant Mancherji Bomanji to his father, they had, at the death of the latter,

become already barred by the Limitation Act then in force, to say nothing of the period which has elapsed between 15th February 1870 and 8th October 1875, when the plaint in this suit was filed.

It was contended, however, on the plaintiff's behalf that the sums standing to the father's credit with the firms of Govind Hari Walekar & Co., or Hari Govind, which the defendant Mancherji Bomanji was, by his father's consent, allowed to have the benefit of in cotton transactions on the joint account of himself and Govind Hari (as Hari Govind), whether they were also debts or not, and whether time-barred or not, ought to be treated as an advancement by Bomanji to his son Mancherji, and ought, under Section 5 of the Statute XXII and XXIII, Car. II, c. 10 (commonly called the Statute of Distribution), to be taken and accepted by Mancherji in lieu of, or, if less in amount than the share, on account of Mancherji's share in the estate of his father, the intestate. By Section 42 of the Indian Succession Act (X of 1865), which came into force on 16th March 1865, it is provided that advancements to a child are not to be taken into account in estimating the distributive share of such child, or the descendant of such child in the estate of a lineal ancestor, thus repealing in effect the provision as to advancement in Section 5 of the English Statute of Distribution. By Section 8, however, of the Parsi Succession Act (XXI of 1865), which came into force on 10th April 1865, it is enacted that certain portions of the Indian Succession Act, and in these is included Section 42, shall not apply to Parsis.

The effect of this was, it was contended, that though the whole general scheme of distribution among the widow, children, and representatives of predeceased children, and next of kin of intestates, provided by the English Statute of Distribution, is abrogated, though not expressly repealed, by Act XXI of 1865, in the case of Parsis, yet that the provisions of Section 5 of the Statute of Distributions as to advancement, not being expressly repealed, are still to attach on and limit the scheme of distribution provided for Parsis by Act XXI of 1865.

The express abrogation contained in Section 42 of the Indian Succession Act of the English rule as to advancement, founded as

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it was on Section 5 of the English Statute of Distribution, may have been considered necessary when the scheme of distribution as contained in the Indian Succession Act (and which, though intended to apply to Indian subjects of the British Crown generally, was so intended only after excluding the vast majority of such subjects, viz., Hindus, Mahammadans, and Buddhists) was in substance, though in a developed and expanded form, the same as that provided in the English Statute of Distribution. But it is very difficult to suppose, when a scheme of distribution such as that contained in the Parsi Succession Act, differing as it does in many very essential points from that of the English Statute of Distribution, was being introduced for the regulation of the intestate succession of a particular community, it should have been in contemplation to retain a special branch or limiting proviso of the enactment, the whole basis and substantive provisions of which were being repealed.

The only reason I can suppose for excluding, by Section 8 of Act XXI of 1865, Section 42 of Act X of 1865 (which repealed the English rule as to advancement) with other parts of the last-named Act from having application to Parsis, was, either that the rule itself was not considered as applicable to them, and so its repeal, so far as they were concerned, was superfluous; or that it was considered that, by the effect of the scheme of distribution provided for Parsis by Act XXI of 1865, the rule as to advancement would, of itself, fall. But for the express exclusion of Section 42 of the Indian Succession Act from application to Parsis, I should not have felt any doubt that the effect of the Parsi Succession Act of 1865 was to abrogate, so far as Parsis are concerned, the rule as to children's advancements being accounted for in distribution, if, in fact, applicable to them at all, together with the rest of the scheme of distribution established by the Statute XXII and XXIII, Car. II, c. 10; and, for the reasons above stated, I think that Section 8 of the Parsi Succession Act, so far as it excludes the repealing clause, Section 42 of the Indian Succession Act, from applying to Parsis, may be accounted for without supposing it to have been the intention of the Legislature to preserve this rule in force for the Parsi community alone of all

the Indian subjects of the Crown. I do not, therefore, consider it necessary to discuss the cases cited by the learned counsel for the plaintiff, in reference to the question of advancement, viz., *Gilbert* v. *Wetherell*,(1) *Auster* v. *Powell*,(2) and *Boyd* v. *Boyd*;(3) though, had I considered the rule as to advancement applicable to Parsis, the cases would have had a material bearing on the present suit.

In regard, however, to two other cases, viz., *Courtenay* v. *Williams*(4) and *In re Cordwell's Estate*,(5) cited by the same counsel, it is still necessary to consider the question whether the plaintiff has established that there was a debt, whether presently and without an account taken ascertained or not, due by the defendant Mancherji Bomanji to his father. The former case shows that in an administration suit an executor may retain so much of a legacy as is sufficient to satisfy a debt due from the legatee to the testator, though the remedy for such debt was, at the time of the testator's death, barred by the Statute of Limitation, XXI Jac. I, c. 16; and the latter case shows that one of the next-of-kin of an intestate, and, as such, entitled to a distributive share in his estate, can, in an administration, require payment of such share from the administrator only after such next-of-kin has discharged any obligation he may be under to the estate, and that even though the remedy for recovering such obligation may have been barred to the estate. The question, then, requires a decision, whether or not the defendant Mancherji was, in fact, a debtor to his father.

The learned Judge having reviewed the evidence at considerable length as to the transaction with Govind Hari, in respect of which the plaintiff contended a debt by the defendant Mancherji Bomanji to the estate of his father, the intestate, had arisen, came to the conclusion that though in the said transactions the name of the defendant Mancherji Bomanji (the son of the intestate) was used, as also was that of Hari Govind (the infant son of Govind Hari), yet that the transactions, so far as the defendant Mancherji Bomanji was concerned, were not really his, but transactions of his father, the intestate, and that there was no debt in

(1) 2 Sim. and St. 254.
(2) 1 DeG. J. & Sm. 99.
(3) L. R. 4 Eq. 305.
(4) 3 Hare 539.
(5) L. R. 20 Eq. 644.

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fact due by the defendant Mancherji Bomanji to the estate of the intestate. This being so, the Court proceeded to pass the ordinary administration decree, but directed that the plaintiff should bear his own costs and pay the defendant's costs of the hearing, except those of the first day, and also all other costs of the suit occasioned by the introduction into the plaint of the matters the subject of the five issues, and reserved the question of the costs of the suit not provided for as aforesaid, and further directions.

[ORIGINAL CIVIL.]

Before Sir M. R. Westropp, Knight, Chief Justice, and Sir Charles Sargent, Knight, Justice.

June 22.

WALJI KARIMJI (PLAINTIFF) *v.* JAGANATH PREMJI *et ux.* (DEFENDANTS).*

Jurisdiction—Court of Small Causes (Bombay)—Suit for possession of immoveable property of a value greater than Rs. 500 *and less than Rs.* 1,000 *—Act IX of* 1850*—Act XXVI of* 1864.

The effect of Section 2 of Act XXVI of 1864 is to extend the compulsory jurisdiction of the Courts of Small Causes in the presidency towns, in suits to recover property, to cases where the value of the property does not exceed Rs. 1,000.

The Court of Small Causes at Bombay has, therefore, jurisdiction to try a suit for the possession of immoveable property of a value greater than Rs. 500 and less than Rs. 1,000.

Sreemutty Shibosoondary Dossee v. *Táracknáth Pandit* (2 Ind. Jur. 145, *note*) dissented from.

THE following case was stated for the opinion of the High Court, under Section 7 of Act XXVI of 1864, by J. O'Leary, First Judge, and Gunpatráo Bháskar, Acting Third Judge, of the Court of Small Causes at Bombay :—

This was a suit to recover possession of a piece of ground, with a house situate thereon, at Bhandárwádá, outside the Fort of Bombay. See copy summons annexed.(1) The value of the premises exceeded

* Reference from the Bombay Court of Small Causes, Suit No. 14970 of 1870.

(1) The summons called on the defendants "personally to appear, &c., to answer the plaintiff in an action for the recovery of immoveable property, brought against you, to recover possession of all that, &c., of the value of Rs. 1,000, of which you unlawfully and unjustly refuse to give up possession to the plaintiff, whereby the plaintiff, &c."

Rs. 500 but did not exceed Rs. 1,000. The suit was not instituted under Section 91 of Act IX of 1850 as extended by Act XXVI of 1864, but was brought under the general power which the Acts of 1850 and 1864 have always been supposed to confer on the court, chiefly on the authority of the case of *Radhamoney* v. *Anundomaye*, decided in 1852 by Sir L. Peel, C.J., and Buller and Colvile, JJ.[1] Although this case was, of course, only a ruling as to the effect of the Act of 1850, the principles of it have always been considered by the Judges of this Court as applicable to the Act of 1864.

Our attention has been recently called to a reprint of the abovementioned case,[2] where the date of the decision is, by an obvious misprint, given as 1862, and to a decision of the Calcutta Court of Small Causes, reported in a note thereto, to the effect that this Court has jurisdiction to try suits brought for the recovery of immoveable property, when the value of such property does not exceed Rs. 500, but has no such jurisdiction, whether by consent of parties or not, in cases in which the value of the property exceeds Rs. 500, but does not exceed Rs. 1,000, although in cases where the value exceeds Rs. 1,000, the consent of parties would, under Section 3 of the Act of 1864, clearly give the Court jurisdiction.

The foundation for this alleged diversity of jurisdiction under the two Acts would appear to be this. Sir L. Peel admitting certain difficulties arising out of the general frame of the Act, held in 1852 that under the words "or value of the property in dispute," in Section 25 of Act IX of 1850, the Court had clearly jurisdiction to entertain suits for the recovery of immoveable property. Accordingly, the jurisdiction of the Court in cases not exceeding Rs. 500 has never been doubted, so far as we are aware, in Bombay.

The section of the Act of 1864, however, which defines the class of cases in which the Court shall have jurisdiction between

(1) Sm. Ca. Ct. Chronicle, Vol. I, p. 2 (Calcutta, Jan. 1854).
(2) 2 Ind. Jur. 144.

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Rs. 500 and Rs. 1,000, omits those words, and only adds the general word "demand" to the words used in the Act of 1850, thus:

"Act IX of 1850, Section 25.—All suits, where the debt, or damage claimed, or value of the property in dispute, is not more than Rs. 500 * * * may be, &c."

"Act XXVI of 1864, Section 2.—The jurisdiction of the Courts * * * shall extend to the recovery of any debt, damage, or demand exceeding the sum of, &c."

When, however, the Act of 1864 comes to deal with the cases in which, by consent of parties, the Court can try cases beyond Rs. 1,000 in value, the Act reverts to the language of the Act of 1850, and again uses the words "debt or damage claimed, or value of the property in dispute."[1]

If the view taken by the Judges of the Calcutta Court be correct, the result would appear to be as follows:—

1. According to Sir L. Peel's decision, the Court has, independently of the special powers conferred by Section 91 of Act IX of 1850, clear power to entertain suits for the recovery of immoveable property not exceeding Rs. 500 in value.

2. The words on which Sir L. Peel chiefly relied as conferring this power, not being contained in the Act of 1864, the Court has no such power where the value of the property exceeds Rs. 500 but does not exceed Rs. 1,000.

3. The same words again occurring in the section of the Act of 1864 which gives the Court jurisdiction, if the parties consent, where the value exceeds Rs. 1,000, the Court would have jurisdiction, by consent, where the value of the property was Rs. 10,000; but no such consent would give jurisdiction if the value of the property was. Rs. 750.

The apparent inconsistency involved in this last consideration has always appeared to us almost conclusive as to the intention of the Legislature in the passing of the Act of 1864, namely, that it was to give the Court jurisdiction up to Rs. 1,000, in the same class of suits as those in which it previously had jurisdiction up

[1] Act XXVI of 1864, Sec. 3.

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to Rs. 500; whether this intention has been carried out, is substantially the question we would wish reserved for the opinion of the High Court.

In the case at present under reference the plaintiff was the purchaser, at an auction sale held under a power of sale in a mortgage, of the premises executed by the male defendant. There were several defences on the merits, but they were decided in favour of the plaintiff by the Judge who heard the case, who gave a decree for possession without costs. The defendants moved the Full Court for a new trial, which was refused, and the decree was confirmed, subject to the question whether the fact that the value of the premises exceeds Rs. 500, but does not exceed Rs. 1,000, deprives this Court of jurisdiction.

Upon which question we, therefore, submit the case for the decision of the High Court.

At the hearing of the reference the parties appeared in person, and the decision of the High Court was delivered by

WESTROPP, C.J.—The plaintiff, as purchaser at an auction sale, made under a power of sale contained in a deed of mortgage executed by the male defendant Jaganáth Premji, of certain land and buildings thereon, brought this suit to obtain (recover) possession of the same premises from the defendants. The Court of Small Causes has made a decree for the plaintiff, subject to the question submitted to this Court, whether the fact that the value of the premises exceeds Rs. 500, but does not exceed Rs. 1,000, deprives the Court of Small Causes of jurisdiction.

That Court has called our attention to *Sreemutty Shibosoondary Dossee* v. *Táracknáth Pandit*,[1] decided in the Court of Small Causes at Calcutta, in which case that Court held that its jurisdiction to entertain suits to recover immoveable property, not exceeding Rs. 500 in value, which subsisted under Act IX of 1850, Section 25, was not extended by Act XXVI of 1864, Section 2, to immoveable property not exceeding Rs. 1,000 in value. The Bombay Court of Small Causes appears to have hitherto acted upon the opposite view.

(1) 2 Ind. Jur. 145, *note*.

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The Calcutta Court of Small Causes, in order to arrive at an opinion as to the true construction of Act XXVI of 1864, sought light from the vicissitudes which that measure experienced in the course of its passage as a Bill through the Indian Legislature, but we cannot regard any such inquiry as a legitimate mode of ascertaining the intention of the Legislature. The Calcutta decision is a strong illustration of the danger of such a method, and of the extraordinary conclusions to which it may lead. The Court should resort only to the recognized rules of construction. The Calcutta Court of Small Causes seems to have overlooked (at least it has not mentioned, or, apparently, been guided by) a primary rule for the exposition of statutes, viz., that enactments *in pari materia* should be read together as if they were one law, and interpreted as consistently and harmoniously as their language will fairly admit,—a rule which the Indian Legislature had vividly in its mind when enacting Act XXVI of 1864, the last (16th) section of which expressly directs that "This Act and the said Act IX of 1850 shall be read and construed as one Act, as if the several provisions in the said Act contained, not inconsistent with the provisions of this Act, were repealed and re-enacted in this Act." We are clearly of opinion that the word "demand" in Section 2 of Act XXVI of 1864 must, in conformity with the 16th section of the same Act, as well as in the interests of common sense, and in respect for the Legislature, be treated as including suits for the recovery of immoveable property not exceeding Rs. 1,000 in value. In *Radhamoney Boystomy* v. *Anundomaye Dabey*,[1] Peel, C.J., referring, under the name of "preamble," to the title of Act IX of 1850, viz., "An Act for the more easy recovery of small debts and *demands* in Calcutta, Madras, and Bombay," said: "The preamble of the Act has been relied on as the key to its exposition. The word 'demands' there might no doubt, on the rule *noscitur a sociis*, be read as demands of the same general nature as 'debts,' which is the word that precedes it: that is, be limited to pecuniary claims. But that rule of construction cannot prevail against the plain language of the Act. Now, all pecuniary demands, which are the subject-matter of an action at law, are either for the recovery of a debt

(1) 2 Ind. Jur. 146.

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or for the recovery of damages, and the clause as to jurisdiction contains both these terms; but it also contains a third term in the disjunctive, viz., claims for the recovery of property: that is, demands for the recovery of things *in specie;* and chattels may be recovered *in specie;* as well as lands and houses." The words in the general jurisdiction clause (Section 25) of Act IX of 1850 are "all suits, where the debt or damage claimed, or value of the property in dispute, is not more than Rs. 500;" and it is true that Sir Lawrence Peel, in the judgment just quoted, refers in aid of his conclusion that Section 25 included demands for the recovery of immoveable property, to the express mention, in that section, of "property" not exceeding Rs. 500 in value, and to the circumstance that no distinction was there taken between moveable and inmoveable, or personal and real property. But the mention of property in that section, and the special jurisdiction over houses, lands, and tenements in the case of tenants and occupiers in Section 91 of the same Act, fix upon the word "demands," used in the title of that Act (and in referring to it, repeated in the preamble of Act XXVI of 1864), a meaning which includes demands for property moveable and immoveable; and the mere circumstance that the words "value of the property in dispute" are omitted in Section 2 of Act XXVI of 1864, would not justify us in giving to the word "demand," which has been substituted for them, a more limited construction than the same word in the plural certainly bore in the title of Act IX of 1850, and was, as we have pointed out, placed upon it by Sir Lawrence Peel and his colleagues in 1852. The proposition, that the word "demand" in Section 2 of Act XXVI of 1864 bears the same meaning as the word "demands" in the title of Act IX of 1850, is confirmed by Section 3 of Act XXVI of 1864, although the words "value of the property in dispute" occur in that section; for it is manifest that the Legislature, in enacting, as it did by the 3rd section, that in case of an agreement by the parties, or their attorneys, that the Court shall have power to try any action (not included in the proviso, *i.e.*, amongst the exceptions in Section 25 of Act IX of 1850), in which the debt or damage claimed, or value of the property in dispute, shall exceed the value of Rs. 1,000, then, and in such case, the Court shall have jurisdiction to try such action, it (the Legislature)

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must have been of opinion that, by using the word "demand" in the 2nd section, it had given the Court a jurisdiction in cases of property exceeding Rs. 500 and less than Rs. 1,000, independently of the consent of the parties or their attorneys; for it would be an insult to the common sense of the legislative body to suppose that it had given a compulsory jurisdiction in suits to recover property not exceeding Rs. 500 in value, and a jurisdiction on consent in cases of property exceeding Rs. 1,000 to an unlimited extent, but no jurisdiction whatever, either with or without consent of the parties, where the property exceeded Rs. 500 and did not exceed Rs. 1,000. There really is not the slightest necessity for attributing any such absurdity or oversight to the Legislature. Interpreting the word "demand" in the 2nd section of Act XXVI of 1864, as co-extensive with the same word in the title of Act IX of 1850, we effectuate what we have no doubt was the intention of the Legislature, viz., to extend the compulsory jurisdiction of the Courts of Small Causes, in the presidency towns in suits to recover property, to cases where the value of the property does not exceed Rs. 1,000.

We accordingly think that the Court of Small Causes had jurisdiction in this case, and that the decree, made by that Court for the plaintiff, must be upheld.

The parties appeared here in person and not by counsel or attorney. Such costs, however, as there may be of drawing up the reference, and of and relating to our order, must be paid by the male defendant to the plaintiff.

It may be well to mention that, in 1851, Sir Lawrence Peel, C.J., casually expressed an opinion in *Hurrymoney Dossee* v. *Gopaulchunder Mookerjee*,(1) to the same effect as his and his colleague's subsequent positive decision in *Radhamoney Boystomey* v. *Anundomaye Dabey*,(2) that not only was jurisdiction over suits to recover immoveable property not exceeding Rs. 500 in value conferred by Section 25 of Act IX of 1850, but also jurisdiction to try the title in such cases. The point actually decided in *Hurrymoney Dossee* v. *Gopaulchunder Mookerjee*,(3) by Peel, C.J., was that the

(1) 2 Taylor and Bell 57, 58.

(2) 2 Ind. Jur. 146.

(3) 2 Taylor and Bell 57.

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Court of Small Causes had not jurisdiction, under Section 91 of Act IX of 1850, to try a case of pure adverse title between two claimants of the fee in immoveable property exceeding Rs. 500 in value. The defendant in possession there insisted that he was entitled to hold absolutely as heir, while the claimant (the plaintiff and alleged owner) claimed under the defendants' ancestor in virtue of a bill of sale executed by him in his life-time.

Decree affirmed.

[ORIGINAL CIVIL.]

Before Sir M. R. Westropp, Knight, Chief Justice, and Sir Charles Sargent, Knight, Justice.

NOWLÁ OOMÁ (PLAINTIFF) *v.* BALA DHURMAJI (DEFENDANT).* June 22.

Jurisdiction—Bombay Court of Small Causes—Title to immoveable property—Form of Suit—Practice—Leave to amend Summons—Act IX of 1850—Act XXVI of 1864.

In a suit brought under Section 91 of Act IX of 1850, the Bombay Court of Small Causes has no jurisdiction to try a question of adverse title to the immoveable property, the subject of the suit. *Aliter* if the suit be brought under Section 25 of Act IX of 1850, as extended by Section 2 of Act XXVI of 1864, and the value of the property in dispute do not exceed Rs. 1,000.

In a case involving a question of adverse title the plaintiff should be allowed to amend the summons issued under Section 91 of Act IX of 1850, so as to render it conformable with a claim under Section 25 of Act XXVI of 1864, if the summons were issued in the mistaken form by the fault of the Clerk of the Court, and not of the plaintiff.

THE following case was stated for the opinion of the High Court by J. O'Leary, First Judge of the Court of Small Causes at Bombay, under Section 55 of Act IX of 1850 :—

This suit was brought by the plaintiff, under Section 91 of Act IX of 1850, to recover possession of a room in a house. See copy summons annexed.(1)

* Small Cause Court Reference, Suit No. 22943 of 1874.

(1) The summons called on the defendant "personally to appear, &c., to answer to the complaint of Nowlá Oomá, the plaintiff above named, of your neglect, or refusal to quit and deliver up to him possession of a room in house &c., and occupied by you as plaintiff's monthly tenant."

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No evidence was taken by me, but certain facts hereinafter stated were admitted, and on the defendant's statement of his defence I struck out the case for want of jurisdiction, and on the request of the plaintiff I made that order subject to the opinion of the High Court.

Defendant, it was admitted, had been the owner of the house. It was, on 4th November 1873, purchased by plaintiff from a Márvádi firm, called Huckma Lálá & Co., who sold it under a power of sale contained in a mortgage deed, dated 8th November 1869, executed by defendant in favour of Huckma Lálá & Co.

Defendant admitted his signature to the mortgage deed of 8th November 1869, and also to a deed of further charge, dated 10th January 1872.

He stated that he was drunk when he executed the mortgage of 8th November 1869, and that it was obtained from him by fraud, and was not binding on him.

As to the deed of further charge, he also alleged fraud with regard to it, and that he had received no consideration for it.

Plaintiff alleged that the value of the house was about Rs. 2,000, and that the portion of it not occupied by defendant was occupied by tenants, who paid plaintiff rent.

The question which I was requested to submit for the opinion of the High Court, and which I do accordingly respectfully submit, is whether, by the statement of such a defence as is set forth above by the defendant, in a suit brought under Section 91 of Act IX of 1850, the jurisdiction of the Court is ousted.

I was of opinion that it was, and struck out the case accordingly, subject to the opinion of the High Court, which I now respectfully solicit.

At the hearing of the reference there was no appearance of the parties, either in person or by counsel.

The opinion of the High Court on the question referred was delivered by

WESTROPP, C.J.—It is admitted that the defendant, by deed of the 8th November 1869, mortgaged a house at Mazagon to

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certain Márvádis. That mortgage contained a power of sale in the event of the mortgage money not being duly repaid at the time fixed. The defendant alleges that he was drunk when he executed that mortgage, and that it was obtained from him by fraud, but he does not appear to have added that it was without consideration. He admits that, on the 10th of January 1872, he executed, in favour of the same Márvádis, a deed of further charge on the same house. This deed the defendant alleges to have been obtained from him by fraud and without consideration.

The Márvádis sold the house, on the 4th November 1873, to the plaintiff under the power of sale contained in the first mortgage, that of the 8th November 1869. The learned Chief Judge of the Court of Small Causes does not state whether the vendors executed to the plaintiff a deed of sale; but, in the absence of any statement to the contrary, we presume that such a deed was executed. It is also not mentioned whether the plaintiff, when he purchased the house, had notice of the assertions of the defendant, that the first mortgage was obtained from him when he was drunk and by fraud, and that the second mortgage was without consideration and procured by fraud.

The plaintiff alleged that the value of the house was about Rs. 2,000; but he brought this action to recover only one room in it, occupied by the defendant, and the value of which is not stated, but most probably was under Rs. 1,000, if not, as is not unlikely, under Rs. 500. The plaintiff asserted that the residue of the house was occupied by tenants who paid rent to him for their lodgings. This assertion is not stated to have been denied.

The Chief Judge observes that this suit was brought under Section 91 of Act IX of 1850, and we perceive that, although that section is not mentioned in the summons, his observation is manifestly correct, as is apparent from the form of that document, which treats the defendant as a monthly tenant of the plaintiff, and requires him in that capacity to quit and deliver up possession of the room in question to the plaintiff. The suit is clearly not brought upon Section 25 of the same Act, the form of the summons under that section or Section 2 of Act XXVI of 1864 being, as is exemplified by the summons in *Walji Karimji* v.

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Jagannáth Premji and *Gulbái, his wife*,[1] to which case we shall presently advert, quite different from that under Section 91. If this suit had been brought under Section 25 of Act IX of 1850, and if the room be under Rs. 500 in value, the Court of Small Causes would certainly have jurisdiction to try this case, notwithstanding that the title to the room is in dispute. The case of *Radhamoney Boystomey* v. *Anundomaye Dabey*,[2] decided in the Supreme Court at Calcutta by Peel, C.J., and Buller and Colvile, JJ., in 1852, shows conclusively that to be so. Our recent decision in *Walji Karimji* v. *Jagannáth Premji* and *Gulbái, his wife*,[3] in which we differed from the judgment of the Calcutta Court of Small Causes given in 1866 in *Sreemutty Shibosoondery Dossee* v. *Táracknáth Pandit*,[4] shows that, in our opinion, the Bombay Court of Small Causes would have jurisdiction to try this suit, if it had been brought under Section 25 of Act IX of 1850 taken in conjunction with Section 2 of Act XXVI of 1864, provided that the room did not exceed in value Rs. 1,000. But the learned Chief Judge of the Court of Small Causes has held that, having regard to the fact that this suit is brought under Section 91 of Act IX of 1850, and to the nature of the defence set up, whereby the defendant disputes the plaintiff's title on the grounds already stated, the Court of Small Causes had not jurisdiction to try the suit, and, subject to the question submitted to us as to whether it had such jurisdiction, has struck the cause out of his list.

His view is completely supported by a decision, in 1851, of the Supreme Court of Calcutta in the case of *Hurrymoney Dossee* v. *Gopaulchander Mookerji*,[5] when it ordered a writ of prohibition to issue to the Court of Small Causes in Calcutta, where the plaintiff had sued to recover land (exceeding Rs. 500 in value), whereof he had been in possession for many years under a conveyance from the father of the defendant, and of which land he had been forcibly dispossessed by the defendant, who claimed as heir. The judgment of the Supreme Court was given by Peel, C.J., who, while admitting that the Court of Small Causes had jurisdic-

(1) *Supra* p. 84.
(2) 2 Ind. Jur. 144.
(3) *Supra* p. 84.
(4) 2 Ind. Jur., note to p. 145, *et seq.*
(5) 2 Taylor and Bell, 57.

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tion to try the title to immoveable property, under Section 25 of Act IX of 1850, where the value did not exceed Rs. 500, said of Section 91: "But the section on which this question turns is entirely different, and framed with a different view; it is framed to empower the Court to give possession in certain cases, leaving the title untried, and subject to litigation in the same or another Court. It is important to bear in mind, in considering the meaning of this clause, that the Court for trial of Small Causes is directed to act on the same substantive law on which this Court proceeds: the procedure is different, but both Courts are subject to the same law. Therefore, whether in that Court or this, one suing to recover lands on title must recover on the strength of his own title. To turn the occupier out of possession, that he might try *his* title by suit, would in some cases expose him to immediate injury. The value of possession where there is no title is so well known that it would be quite unreasonable to suppose that it had escaped the notice of the Legislature, or that, when they reserved to another tribunal, or trial, this decision of title, they meant to invert the position of the several claimants, to displace one from the possession, and to put in another, whose claim, had he been in the position of a plaintiff, might not have been capable of proof, or might have been subjected also to some defect. The title of purchasers would, indeed, be exposed to new risks if the Legislature had sanctioned any such procedure; but nothing of the kind is inferrible from the Act: it is true that this Act differs in these sections from the language of the English Act from which it is mainly taken, and goes beyond it. The corresponding section of that Act extends to landlords and tenants only: to persons who have stood to each other in that peculiar relation. This Act goes further: it uses the word 'occupier' as distinct from 'tenant,' and 'occupy' as distinct from 'hold.' But the context shows plainly that 'occupier' is used in a sense in which it is frequently employed to denote mere actual possessions of land which are permissive, or have been so, and yet where there is no holding or tenure by any hand, and no relation of a tenant to a landlord, or ever was; it includes adverse holdings on a once permitted occupation, as where a house has been lent, or a servant or clerk has in part occupied; but only as incidental to his

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service, and not with any view to tenantry. The sense of the word is derivable from its association with the word 'tenant,' and it would be a strange rule of construction to force it into the sense of an adverse holding by one claiming to hold as absolute holder, whether on a good or bad title. There are some cases of adverse holding within the Act, as where the holder has once stood in a position to 'the owner' inconsistent with any claim of title in himself; as where he has come in under the owner, or those from whom the owner derives title, whether as tenant or as permitted user or occupier of the property without legal interest. But this case is merely that of possession by one claiming to hold absolutely as heir, whilst the claimant, 'the owner,' claims under the ancestor by some act in his life-time. This is a pure adverse title between two claimants of the fee, and to such a case these sections (91 to 98) of the Act have no application. It was contended on the affidavits that jurisdiction existed in this case, because the actual occupier had ousted the claimant. The Act, however, does not extend to such a case, to restore possession on a forcible ouster, though a jurisdiction of the same kind exists in the mofussil. The whole language of the Act points to a continuation of occupation consequent on a once lawful possession. Prohibition appears to be a proper remedy: this remedy exists even where the Court has jurisdiction, but is about to do something injurious to a legal right in a way unauthorized by law: it does not apply to mere errors of decision, which can only be remedied by appeal." What follows is peculiarly applicable here. Sir L. Peel continues thus: "In this case the value appears to be above that of the limit fixed for the jurisdiction of the Court below: but, independently of that, if that Court was proceeding to eject, under these clauses, a person as to whom the claimant was not in the position of owner within the meaning of these sections (*i.e.*, sections 91 to 98), the remedy would still attach even in a case where the title might be tried in that Court; because the inversion of the position of the rivals might work an irremediable wrong."

We understand Sir Lawrence Peel in that passage to mean that if the plaintiff has sued out his summons under the 91st and following sections of Act IX of 1850, he ought not, in the event of

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its appearing, that the property does not exceed Rs. 500 in value, to be permitted to treat the case as if the summons had been sued out under Section 25 of that Act, and to proceed with the case although the defendant may claim against him the fee adversely We are not prepared to differ from that view. If, however, it appears to the Court of Small Causes that the Clerk of the Court, and not the plaintiff, is, as very probably may be, the person responsible for the mistaken form in which the summons has been issued, it would, we think, be fair to permit the plaintiff to amend his summons so as to render it conformable with a claim under Section 25 of Act XXVI of 1864, provided the Court be satisfied that the room sued for does not exceed Rs. 1,000 in value, and that the plaintiff is, as he avers, in possession of the residue of the house, and that this suit, though ostensibly for a room, is not really brought to try the title to the house. In cases under Rs. 1,000 in value the Court of Small Causes may, under the 25th Section of Act IX of 1850, combined with Section 2 of Act XXVI of 1864, hear such legal or equitable defence as the defendant may have.

If the Court of Small Causes be of opinion that there are not in this case such circumstances, as above indicated, which would justify an amendment, we think that the Judge would be right in dismissing the cause for want of jurisdiction, on the ground that a defence resting upon an adverse title to the fee takes the case out of Section 91 of Act IX of 1850.

The Court of Small Causes will dispose of the costs of this reference as may be just. There was not any appearance here by or for either party.

Case remanded.

[APPELLATE CIVIL.]

Before Sir M. R. Westropp, Knight, Chief Justice, and Mr. Justice Nánábhái Haridás.

January 17.

SATRA KUMAJI (PLAINTIFF AND APPELLANT) *v.* VISRAM HASGAVDA (DEFENDANT AND RESPONDENT).*

Deed of assignment of mortgage—Consideration—Registration.

A deed of assignment for a consideration of less than Rs. 100, of a mortgage for a consideration of Rs. 100, or upwards, does not need registration.

* Special Appeal No. 328 of 1876.

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Vásudev v. *Rámá* (11 Bom. H. C. Rep., 149) and *Rohinee Debia* v. *Shib Chunder Chatterjee* (15 Calc., W. R., 558 Civ. Rul.) followed.

THIS was a special appeal from the decision of W. M. Coghlan, District Judge at Tháná, affirming the decree of Báláji Raghunáth, 2nd Class Subordinate Judge at Alibág.

The plaintiff, as assignee of a mortgage for Rs. 100, sued to recover from the defendant personally, or from the mortgaged property, the sum of Rs. 157-8-0, due under the mortgage for principal and interest.

The deed of assignment to the plaintiff purported to have been executed in consideration of the sum of Rs. 57, paid by the plaintiff to the original mortgagee, and was unregistered. Both the Lower Courts held that as the deed of assignment conveyed an interest in immoveable property, which was valued at Rs. 100 in the mortgage deed, the deed of assignment ought to have been registered, and rejected the plaintiff's claim, as it was based upon such unregistered deed. The original mortgage was registered.

Bhairavnáth Mangesh, for the appellant, contended that both the Lower Courts were wrong in holding that registration of the deed of assignment was necessary, and relied on *Vásudev* v. *Rámá*.[1]

Máhádev Chimnáji for the respondent.

WESTROPP, C. J. :—The Court, following its own decision in *Vásudev Moreshwar Gumpule* v. *Rámá Bábáji Dange*[2] and the Calcutta decision—*Rohinee Debia* v. *Shib Chunder Chatterjee*,[3] holds that the deed of assignment (Exhibit No. 4), being for a consideration less than Rs. 100, did not require registration. It may be that the parties to the original mortgage (Exhibit No. 3) valued the security and the solvency of the parties at Rs. 100 or upwards, but it does not thence follow that either or both were deemed of that value at the date of the assignment, and it was for the parties to that latter transaction, for the purposes of registration, to fix the value of the interest thereby assigned. This Court, therefore, reverses the decree of the District Judge and remands this cause for a new trial on the merits.

Decree reversed.

(1) 11 Bom. H. C. Rep., 149. (2) 11 Bom. H. C. Rep., 149.
(3) 15 Calc., W. R., 558, Civ. Rul.

PRIVY COUNCIL.

March 1, 2, 1877.

PRESENT.

SIR JAMES W. COLVILE. | SIR MONTAGUE E. SMITH.
SIR BARNES PEACOCK. | SIR ROBERT P. COLLIER.

ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT BOMBAY.

VÁSUDEV SADÁSHIV MODAK (PLAINTIFF) *v.* THE COLLECTOR OF RATNÁGIRI (DEFENDANT).

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March 1, 2.

"The Pensions Act, 1871"—*Jurisdiction—Desmukh.*

A plaintiff alleging that, as the hereditary Desmukh of certain máháls, he was entitled to be paid directly by the ryots of these máháls a percentage on the revenue thereon assessed, sued to recover a portion of such percentage which had been collected along with the revenue and retained by the Government: *Held* that the claim was "a suit relating to a grant of money or land revenue," and as such excluded from the jurisdiction of the Civil Courts by Section 4 of "the Pensions Act, 1871."

THE sole question for decision on this appeal was whether the suit brought by the appellant as plaintiff was, as had been held by the Courts below, excluded, by the provisions of Act XXIII of 1871, from the jurisdiction of the Civil Courts.

The rights which the plaintiff sought to establish in this suit were set forth in a sanad, granted on the 3rd March 1777, by Mádhavráv Peishwá to the plaintiff's ancestors, Sadáshiv Raghunáth and Báláji Govind Modak.

This document, which was addressed to the Máhájans and Khots (officers employed to collect the revenue) of certain máháls therein named, began with a recital that the said Sadáshiv Báláji had come before the Peishwá, representing that the desmukhi watan of the said máháls, which had been long enjoyed by their ancestors, and which included a right to levy directly from the ryots of these máháls half-an-anna on every rupee of revenue collected in cash, half a maund on every kandi of revenue collected in grain, half a maund on every kandi of ghee sold by milkmen, half-an-anna on every rupee on articles sold by weight, and two annas and a half on every thousand articles sold by number, had been resumed by Máhárájad Siváji, who had granted in lieu thereof a fixed yearly allowance of Rs. 75, which allowance had afterwards been increased by Kánoji Angria and other rulers. After reciting

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the prayer of the said Sadáshiv and Báláji Modak that the Peishwá would grant letters, authorizing them to levy their desmukhi haks, as formerly, directly from the ryots, and further reciting that a claim, which had been made by certain other parties to participate in the said haks, had not been substantiated; the sanad proceeded:—"It follows that the hak of the Modaks aforesaid, which is now held in abeyance, should be released to be levied by them directly from the ryots in accordance with the jamábandi. We are, therefore, graciously pleased to release their haks which were credited to the Government, and to grant this ajnapatra (order). Do you, therefore, cause the amount of their hak on the Government jamábandi, whatever it may amount to according to the established practice, to be paid by the ryots to them, their sons and grandsons, &c., from generation to generation."

It will be noticed that while the dues leviable under this sanad on revenue assessed in cash amount to $3\frac{1}{8}$ per cent., the dues on the grain assessment were only $2\frac{1}{2}$ per cent. The dues on both assessments continued, up to the year 1842, to be collected by the plaintiff's ancestors and by himself directly from the ryots. After that year the Government officials collected them with the regular revenue and paid them over to the plaintiff.

In the year 1866 a new revenue settlement came into force. The grain assessments were abandoned, and a consolidated cash assessment was introduced. When this change took place, the present appellant contended that he was entitled to receive half-an-anna in the rupee ($3\frac{1}{8}$ per cent.) upon the whole consolidated cash assessment; whereas the Government contended that he was only entitled to this percentage upon the amount of the original cash assessment, and that upon the balance he could only claim the percentage ($2\frac{1}{2}$) which he would have received if the amount had been levied in grain under the old system. Finally, in a suit brought by the appellant against the Collector of Ratnágiri, it was decided that as the appellant was deprived of various advantages by the change in the system of assessment, it was equitable that he should be paid his dues on the higher scale. The Collector was accordingly ordered to pay the appellant's dues at the rate of half-an-anna in the rupee on the entire assessment for the years 1866-67 and 1867-68.

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The present suit relates to the desmukhi dues payable to the plaintiff for the years 1868-69 and the subsequent years up to 1871-72. The plaint was filed in the District Court of Ratnágiri on the 31st March 1873. It set forth that the plaintiff was entitled, as hereditary desmukh of certain máháls in the Ratnágiri district, to levy from the ryots of these máháls half-an-anna on every rupee of revenue assessed in cash; that this due had formerly been recovered by the desmukh directly from the ryots, but had latterly been received by the Government on behalf of the desmukh; that the plaintiff's right to receive the amount in full had been established in the suit recently brought by him against the Collector of Ratnágiri, but that payment of part of his dues being again withheld by Government, the present suit was brought to enforce it. The plaint further alleged that whereas, under the provisions of Act XI of 1843, a single person might be appointed to discharge the duties of the plaintiff's office, the Government, without the plaintiff's consent, had appointed more than one such person, and had remunerated them out of the dues belonging to the plaintiff. The plaintiff claimed that these persons should be dismissed, and the amount paid to them refunded. The plaint also alleged that certain lands, on which revenue had formerly been assessed, had been planted by the Government as a teak forest on which no fixed revenue was assessed, although the timber grown thereon was cut and sold by the Government. The plaintiff claimed to be paid his dues in respect of the revenue realized by Government through the sale of such timber. He also claimed interest on the various items of his demand.

The Collector of Ratnágiri put in a written statement, in which, among other objections, he submitted that the jurisdiction of the Civil Courts was ousted by the provisions of Act XXIII of 1871.

The case came on for hearing before the District Judge on the 24th October 1873, when the plaintiff's pleader was examined by the Court, under Section 125, Act VIII of 1859, as to the nature of his claim, and stated that the hak claimed was an allowance obtained from, and payable by, not the Government but the ryots; and, although the Government at that time collected the amount from the ryots, yet that it did so on the plaintiff's behalf, and as due to the plaintiff; and that the Government merely paid over

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the same to the plaintiff, but did not pay anything out of its own funds. Further, that, according to the practice, the plaintiff could release or alienate his *watan*, and that the Government could not refuse to give effect to such a transaction, nor could it alter the amount payable.

A representation, in writing, to the same effect was on the same day submitted to the Judge, who decided that, on the statements contained in the plaint and made by the plaintiff's pleader on his behalf, the claim was barred by the provisions of the Pensions Act, and that it was, therefore, unnecessary to enter into the merits of the case, or take evidence therein. He accordingly dismissed the plaintiff's suit with costs.

In coming to this decision it would appear that the Judge had before him the record of a suit (referred to in the plaint) in which the plaintiff had established against the Government his right to be paid his entire dues at the rate of $3\frac{1}{8}$ per cent., and, as part of that record, the sanad of March 1777, the substance of which has been given above.

Against the decision of the District Judge the plaintiff preferred a regular appeal to the High Court at Bombay. He objected that the Judge had erred in holding the suit to be barred by Act XXIII of 1871, since it did not relate to a pension payable on the part of Government within the meaning of that Act; and that he had erred in refusing to go into the merits of the case, and to take the evidence offered by the plaintiff. He also contended that the Judge's decision was against the weight of evidence.

On the 1st October 1874, the High Court confirmed the decree of the District Judge and dismissed the plaintiff's appeal with costs. The reasons, on which the Court went, were thus stated:—

"The argument for the appellant is, as we understand it, that the grant to the original holder of the watans was of a personal nature, conferring upon him and his heirs for ever a right to collect for themselves the emoluments pertaining to their office; that this right was not a pension, or grant of money, or land revenue, payable on the part of Government. * * * * After giving the matter, really in dispute, our very careful consideration, we are

obliged to concur with the Judge below in thinking that the Collector's objection was a valid one, and that the claim preferred was one that the Civil Courts have, under Act XXIII of 1871, no power to entertain, the suit having been instituted after the said Act became law. The wording of Section 4 of the Pensions Act is most clear and comprehensive. It provides 'except as hereinafter provided, no Civil Court shall entertain any suit relating to any pension or grant of money or land revenue conferred or made by the British or any former Government, whatever may have been the consideration for any such pension or grant, and whatever may have been the nature of the payment, claim, or right, for which such pension or grant may have been substituted,' and Section 3 interprets the expression 'grant of money or land revenue' to include 'anything payable on the part of Government in respect of any right, privilege, perquisite, or office.' Now, according to plaintiff's own showing, it is clear that the allowance was, in its inception, either a pension, or a grant of money, or land revenue, or both. It was a pension or annual sum conferred, and it was a grant of land revenue made for services to be rendered. The mode in which it was to be levied appears to be immaterial. The Government of the time having the undoubted right to levy assessments on all cultivated lands, not expressly exempted from assessment, assigned a portion of such assessment or land-revenue, varying each year, according to the amount of the assessment which the Government reserved to itself for the remuneration of the watandars. It is argued for plaintiff that the grant was not an assignment of money or land revenue payable on the part of Government; but it is impossible to regard it in any other light, and it is clear that it has been so treated both before 1842 and after that year, when the Government assumed to itself the right, with the assent apparently of the holders, of itself levying the assigned portion and paying the watandars. The wording of the sections quoted leaves no room for doubt that this is a claim which the Civil Courts cannot entertain. Moreover, looking at the preamble to the Pension Act and to the course of previous legislation (it is unnecessary to enumerate the various Acts here), it is perfectly clear that the intention of the Government of India, in consolidating and amending the laws on the subject, was to reserve to itself the right of considering the validity of claims in

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all parts of India to pensions and similar allowances conferred and granted by itself instead of allowing them to be submitted for adjudication to its own Courts. The plaintiff has his remedy, but not in a Court of law."

The plaintiff appealed from the decisions of the Indian Courts to Her Majesty in Council.

Mr. Cowie, Q. C., and *Mr. J. D. Mayne* for the appellant:—The Courts below were wrong in considering that the dues claimed by the appellant were either a pension, or a grant of money, or land revenue, within the meaning of Act XXIII of 1871. They were fees payable by the ryots and not by the Government, but which, since the year 1842, the Government had taken upon itself to collect. The suit was of the nature of a claim for money had and received to the use of the plaintiff, which the Government was bound to pay over.—*Rangoba Naik* v. *The Collector of Ratnágiri.*[1] The plaintiff's hak was something distinct from revenue. Down to the year 1842 he would have been entitled to come upon the ryots. It could not be understood that his right had been taken from him and compensation given for it. If the plaintiff had continued after 1842 to levy his hak direct from the ryots, and he were now suing for arrears, could it be objected that, under Act XXIII of 1871, the suit would not lie? The inception of the plaintiff's right was not of the nature of a grant by Government out of revenue. [*Sir Montague Smith*:—The right must have originated either in an agreement with the ryots, or in an appointment by Government.] We should have had an opportunity given us of offering evidence that the right was not by grant [*Sir Robert Collier*:—Can you say that this allowance was not payable in respect of a right granted by a former government?] We say, we do not derive our right under the sanad, that was not the creation of our right. It was required to get rid of the previous action of the Government in taking the collection of our hak into its own hands. The sanad merely restores the desmukh to his previous position. The question is whether on the plaint, or on the statement of the plaintiff's pleader, or upon the sanad, it must necessarily be taken that the plaintiff's hak was a charge upon the Government revenue. We say that the materials before the Court were

(1) 8 Bom. H. C. Rep., 112, A. C. J.

insufficient to show that it had not jurisdiction, and we ask that the case be remitted for further trial on this issue.

Mr. J. F. Stephen, Q.C., and *Mr. Graham* for the respondent:—The provisions of Act XXIII of 1871 apply. In its inception the right of the desmukh was a grant by Government out of the land revenue. The function of the desmukh was to collect the revenue for the Government. To remunerate him for his services, it was open to the Government either to pay him directly out of revenue actually received, or to remit some portion of the revenue to the ryots with the view that the expense of collection should be defrayed by them. There is, in reality, no difference in principle between these two modes of payment. The Government is entitled to the whole revenue. The expense of collection is paid out of the revenue by the Government, directly or indirectly, to the Collector. Whatever may have been the nature of the desmukh's rights originally, it is clear, from the recital of the sanad of 1777, that they had been resumed by Government, and the allowances connected with them treated as a part of the general land revenue. When, therefore, the Peishwá, by his sanad, restored to the desmukh his former allowances, that was plainly a grant to him out of the land revenue. In the sanad the desmukh's right is spoken of as a "hak on the Government jamábandi."

Mr. Cowie replied.

At the close of the argument, their Lordships' judgment was delivered by

SIR JAMES W. COLVILE:—This is an appeal against a judgment of the High Court of Bombay, confirming a judgment of the Judge of first instance, which, before the settlement of issues in the cause, dismissed the suit of the appellant on the ground that it was excluded from the jurisdiction of the civil courts by "The Pensions Act, 1871." The material sections of that Statute are the 4th and the 3rd.

The 4th says, "except as hereinafter provided"—and it is admitted that the case does not fall within any of the statutory exceptions—"no civil court shall entertain any suit relating to any pension or grant of money or land revenue conferred or made by the British or any former Government, whatever may have been the consideration for any such pension or grant, and

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whatever may have been the nature of the payment, claim, or grant for which such pension or grant may have been substituted;" and the 3rd, which is an interpretation section, says—"In this Act the expression 'grant of money or land revenue' includes anything payable on the part of Government in respect of any right, privilege, perquisite, or office."

It is to be observed that upon this appeal it would be impossible for their Lordships to pronounce affirmatively that the suit is not one which under the Act is excluded from the jurisdiction of the civil courts. The case, as put by the learned counsel for the appellant, is simply that the materials before the Courts were insufficient to show that they had not jurisdiction, and that therefore the cause should be remitted to India for a fuller trial there on this issue.

The materials which were before the Court were the plaint, the oral examination by the Judge of the plaintiff's pleader, the sanad of the 3rd March 1777, and the judgment in a former suit instituted by the appellant against the Government before the passing of the Act.

The question is, whether, taking all these together, the Judge had not sufficent grounds for saying that the suit was within the meaning and operation of "The Pensions Act, 1871."

The plaintiff's case was that he was the hereditary desmukh of certain turufs or districts; that as such he and his ancestors had long been entitled to receive directly from the ryots a percentage, equivalent to six pie in the rupee, upon that part of the revenue which was assessed in cash; a smaller percentage upon that part which was assessed in grain: and certain other dues which their Lordships think may be dismissed from consideration; because, though the articles in respect of which they were payable were articles upon which revenue was levied under the former native governments, they have long since been abandoned by the British Government as the subjects of revenue, and the rights of the desmukh, in respect of them, are really not in issue in this suit.

The questions arising between the parties may be fully tried and determined upon the first two items of revenue.

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These rights of the desmukhs were, as the plaintiff says, confirmed, or, as the other side put it, re-granted by the sanad of 1777. And the plaintiff alleges that up to the year 1842 he received his dues directly from the ryots; but that since 1842 the Government has received them on his behalf, and become accountable to him for them. It is an undisputed fact that in the year 1868 there was a new revenue settlement, since which the whole of the revenue receiveable by Government and assessed upon the ryots has been a money assessment, no part of the revenue being now assessed in grain.

Upon this state of facts, two distinct questions arise: first, whether in its inception and original character the desmukh's right is not one within the scope and operation of the Act of 1871? Secondly, whether, if that be not the case, the right has not been brought within the scope and operation of the Act by the alterations in its character that have subsequently taken place?

The judgment of the High Court of Bombay answers the first of these questions in the affirmative, and proceeds on that finding.

It says: "Now, according to plaintiff's own showing, it is clear that the allowance was, in its inception, either a pension or a grant of money or land revenue, or both. It was a pension or annual sum conferred, as it was a grant of land revenue made for services to be rendered. The mode in which it was to be levied appears to be immaterial. The Government of the time, having the undoubted right to levy assessment on all cultivated lands, not expressly exempted from assessment, assigned a portion of such assessment of land revenue, varying each year, according to the amount of the assessment which the Government reserved to itself for the remuneration of the watandars."

Their Lordships, without adopting every word of that judgment as their own, are of opinion that the general conclusion is correct, and think it is established by the sanad of 1777. That document recites the representation or petition of the appellant's ancestors, from which it appears that, whatever may have been the nature of the original right, the right of receiving these haks from the ryots had at all events for a considerable number of years been suspended; that as early as the time of Siváji the haks were resumed by the

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Government of the day, and the value of them credited to the Government—that is, treated as part of the general revenue of the country—certain fixed salaries being paid to the desmukhs; and that this system, with some variation as to the amount of the salary continued during the time of Kánoji Angria, and was in force when the country again came under Mahrátta rule. The petition of the then deshmukhs to the Peishwá prayed to have the old and suppressed allowances restored to them; stating, however, that there was a dispute between them and certain other parties as to who were the proper watandars. The result was that the Peishwá recognized the right of the appellant's ancestors as between them and the rival claimants, and made an order upon the máhájans and the khots of the villages of the máhál or turufs in question, enjoining them to cause the amount of the hak on the Government jamábandi, whatever it may amount to, according to the established practice, to be paid by the ryots to the petitioners, their sons and grandsons. Now the original right of these desmukhs, the beginning of which seems to be lost in antiquity, was substantially, as the High Court has put it, in the nature of a grant of revenue. Their functions were those of a collector of revenue for the Government. They were authorized to retain, out of what they received from the ryots, a certain percentage upon that which was fixed as the Government revenue for themselves, paying the balance to the Government. It is difficult to see how the Government could impose upon the ryots the obligation of paying these allowances to their officers, except by the exercise of their sovereign right of imposing and receiving a revenue from all lands which were not in their nature rent free. The land-revenue system in India is founded upon the notion that the State is entitled to receive a certain portion of the produce of all lands not especially exempted from assessment. Of course some governments have been more exacting than others, but the general action of native governments was to take a certain proportion. From the gross amount assessed the expenses of collection must necessarily be deducted; and whether the collectors were paid by salary, or allowed to receive a commission on their collections directly from the ryots, the sum which went into the coffers of the Government was equally reduced by the amount of their allowances.

Their Lordships are of opinion that, whatever the foundation of the desmukhs' rights originally was, the sanad must now be treated as the foundation of those rights as they exist. At the date of that document the receipt of the old allowances had long been interrupted. The whole of what was received from ryots went into the coffers of the State, which paid its collectors by salaries; and, consequently, the restoration of the old allowances by the Peishwá was in substance a grant by him of part of his land revenue, and, therefore, falls within the terms of the 4th section, without the aid of the 3rd, as a grant of money or land revenue conferred by a former government. Therefore their Lordships agree with the High Court in the conclusion to which they came upon the first question; and that is, of course, sufficient to dispose of the present appeal.

If it were necessary to go further and to consider whether the claim, however it might have stood on the sanad, has been brought within the Act by what has since taken place, their Lordships would be of opinion that the judgment in the former suit affords sufficient grounds for so deciding.

That suit proceeded upon the alteration made upon the revenue settlement of 1868. The plaintiff appears to have claimed six pies in the rupee upon the total amount of the assessment, which then consisted wholly of money. The Government met that claim by a contention that upon so much of the existing assessment as might be considered to represent the former grain assessment he was entitled only to the smaller percentage. The Judge decided this question in the plaintiff's favour, and allowed him the larger percentage upon the whole of the assessment; and did so upon this, among other grounds, viz., that by the change in the system of assessment his interest might have been affected, and, therefore, that it was equitable to allow him the larger percentage upon the whole of the then assessment.

His claim in the present suit adopts this definition of his rights, and seeks to enforce them accordingly. The former judgment, therefore, seems to show that what is now payable by Government is so payable out of the general land revenue in respect of a right, privilege, perquisite, or office formerly enjoyed within the meaning of the 3rd section of the Act; and to negative the statement in the

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plaint to the effect that since 1842 the Government has received the desmukh's allowances as something distinct from revenue from the ryots on his behalf and as his agent, under circumstances which would make them liable to him as for money had and received.

It appears, therefore, to their Lordships that no ground has been made for disturbing the judgment of the Court below, and they must humbly advise Her Majesty accordingly. They would have been extremely sorry if they had had to remand the cause, because though it might have been satisfactory to have fuller information on some points raised in the argument, they are satisfied, upon the materials before them, that a fuller trial would equally result in the conclusion that the suit is within "The Pensions Act, 1871," and that the plaintiff must seek his remedy by the procedure thereby provided.

Their Lordships will humbly advise Her Majesty to dismiss the present appeal, and to confirm the judgments below, with the costs of the appeal.

Decree affirmed.

[APPELLATE CIVIL.]

Before Sir M. R. Westropp, Knight, Chief Justice, and Mr. Justice Nánábhái Haridás.

April 4.

THE COLLECTOR OF THÁNÁ (DEFENDANT AND APPELLANT) *v.* BÁL PÁTEL (PLAINTIFF AND RESPONDENT).*

Right to free pasturage—Bombay Act I of 1865, Section 32.

Plaintiff erected a hut on public ground, in a village in the district of Thánáá, and lived there annually for a few months, while his cattle grazed on the public grazing ground in that village. He was not the owner or lessee of any land in the village. On being prevented, by the Collector of Thánáá, from thus grazing his cattle, plaintiff brought a suit against that officer for a declaration of his right to graze his cattle within the limits, not only of that village, but of any other village in the district of Thánáá.

Held that plaintiff was not entitled to any such right.

The phrase "village cattle" in Section 32 of Bombay Act I of 1865 does not include the cattle of any roving grazier, who may choose to squat for a few months on the public ground of a village. That Act does not vest the right of sanctioning such a diversion of the village grazing ground in the villagers themselves, but in the Revenue Commissioner, whose consent must be obtained.

* Special Appeal No. 279 of 1876.

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THIS was a special appeal from the decision of W. M. Coghlan, District Judge at Tháná, affirming, with slight amendment, the decree of H. J. Parsons, Assistant Judge at the same place.

The facts of the case are shortly these. The plaintiff Bál Pátel was a cattle-breeder, and it was his practice to stop with his cattle during the monsoon at the village of Veluk, in the district of Tháná, where he lived in a hut erected by himself on the public ground of the village.

At the end of the monsoon he went for a short time above the Ghâts, and, on his return, worked his way towards the sea at Kelvá Máhim, a táluka in the district of Tháná, and came back to the village of Veluk at the beginning of the monsoon. It did not appear that the villagers of Veluk had ever taken any steps to prevent the plaintiff from following this course, but he had never obtained the leave of the Revenue Commissioner to adopt it.

On the 6th March 1874 the Collector of Tháná issued an order to the Mámlatdár of Shápur, directing him to take steps for preventing persons from grazing their cattle in the manner in which plaintiff grazed his. On the 20th April 1874, the Mámlatdár issued a circular to the village officers in his táluka, directing them to carry out the Collector's order.

Plaintiff's cattle accordingly were driven away from the pasture land in Veluk. He, therefore, instituted the present suit for a declaration that he, like the other inhabitants of the village of Veluk, was entitled by custom to graze his cattle in that and the other villages in the district.

The Assistant Judge held that the Collector's order was illegal, and that the plaintiff was entitled to a declaration of his right as set forth by him in his plaint. He accordingly gave judgment in plaintiff's favour, with costs against the defendant. That decree was affirmed in appeal with a very slight modification. The Collector, thereupon, presented the present special appeal to the High Court.

Farran, Ráo Sáheb V. N. Mandlik (Acting Government Pleader) with him, for the appellant:—The Collector's order has been wrongly held to be illegal. The lower Courts have erred in

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declaring that Government have not the right, both on their own account and in the interest of the public, to prevent the lands reserved by their orders for free pasturage for the people of a particular village from being misappropriated by others.

Máhádev Chimnáji Apte for the respondent :—So long as the respondent was an inhabitant of the village of Veluk he was entitled to use the village grazing grounds. The other inhabitants of Veluk have raised no objection to his so doing.

WESTROPP, C.J.:—The plaintiff (respondent) alleges himself to be a villager of Veluk in the district of Tháná, and in virtue thereof by his plaint prays that it may be declared (*inter alia*), not only that he has a right to graze his cattle within the limits of Mouje Veluk, but also within the limits of any other village of the district of Tháná. The claim to graze his cattle in villages other than Veluk is, on the very face of it, preposterous, and on scrutinizing his claim to graze his cattle in the village grazing ground of Veluk, we perceive that it is quite as ill-founded as his alleged right so to utilize the grazing commons in the other villages of the district of Tháná. It is admitted that he is not the owner of a single square foot of ground in the village of Veluk, but it appears that he had erected a hut on public ground belonging to that village, where he sojourns for a few months while his cattle are engaged in exhausting the grass set apart for the real villagers. Bombay Act I of 1865, Section 32, enacts that the land, thereby authorized to be set apart for "free pasturage for the village cattle" and for certain other purposes therein specified, "shall not be otherwise appropriated or assigned without the sanction of the Revenue Commissioner." It is perfectly absurd to suppose that the term "village cattle" includes the cattle of any or every roving grazier who may choose to squat for a few months on the public grounds of the village, and to allow his cattle to prey upon the lands set apart for the villagers. And the Act does not vest the right of sanctioning such a diversion of the village grazing ground in the villagers themselves, but in the Revenue Commissioner, whose assent it is not pretended has been obtained by the plaintiff. So far from condemning the Collector for his intervention, we think that his conduct was praiseworthy in putting an end to such an abuse as appears to have

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grown up in his collectorate, and in insisting upon the preservation of the village grazing grounds and the Government forests for the purposes for which they are properly reserved. We deem the suit of the plaintiff to be characterized by no ordinary effrontery, and we reverse the decrees of the Courts below with costs of suit and both appeals, which must be paid by the plaintiff to the defendant.

Decrees reversed.

[APPELLATE CIVIL.]

Before Sir M. R. Westropp, Knight, Chief Justice, and Mr. Justice Melvill.

July 4.

SUBHABHAT BIN BABANBHAT (PLAINTIFF AND APPELLANT) *v.* VASUDEVBHAT BIN SUBHABHAT AND OTHERS (DEFENDANTS AND RESPONDENTS).*

A sale convertible into a mortgage.

Where a deed, which on the face of it was described as a mortgage, stated that the grantee was already in possession under a previous mortgage by the grantor, and was under the second deed to receive the profits in liquidation of interest so far as they would go, and that the grantor was not to be liable to repay the principal money or such balance of interest (if any) as might accrue upon it, unless he adopted a son, and the grantee, unless that event happened, was to enjoy the property conveyed in right of purchase for the sum (principal and interest) due to him.

Held that the deed was a sale liable to be converted into a mortgage, and not a mortgage liable to be converted into a sale.

Howard v. *Harris*, (1) *Rámji* v. *Chinto*, (2) *Shankurbhái* v. *Kassibhái*, (3) referred to and distinguished.

THIS was a special appeal from the decision of W. H. Crowe, District Judge of Kanara, affirming the decree of J. L. Fernandez, Subordinate Judge at Coompta.

The plaintiff Subhábhat brought this suit against Vásudevbhat and four others to redeem a mortgage of certain immoveable property described in the plaint. He alleged that the property originally belonged to one Haribhat, from whose representatives—

(1) 1 Vern. 190; S. C. 2 Wh. and Tud. L. C. 947, 3rd Ed.

(2) 1 Bom. H. C. Rep. 199.

(3) 9 Bom. H. C. Rep. 69.

* Special Appeal No. 23 of 1877.

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the fourth and fifth defendants—the plaintiff had himself purchased it. Vásudevbhat, the first defendant, pleaded that he was the owner of the property in dispute; that it was mortgaged to his ancestor Sutbhat Gopi by the said Haribhat by two deeds, the later of which (Exhibit No. 21) was dated the 12th March 1832, and intended to operate as a sale if the said Haribhat died without adopting a son, which event happened, and that consequently this defendant's ancestor became the absolute owner of the property. The answers of the other defendants are not material to the case.

The following is an English translation of Exhibit No. 21 on which the first defendant based his claim:—

"Prosperity. The year of the victorious king Shálivábán, 1753, Khara being the name of the cyclical year, the month Falgoon Shoodh, the date 10th, Monday, the Fasli year 1241 [1832 A.D.] the 12th of March. To Shrimant Shootbhat, son of Shambhat Gopi. A second [or additional] mortgage-deed of land is executed by Haribhat, son of Raghoobhat, as follows:—

Owing to my necessity, I formerly, on the 2nd of Kártik Shoodh, in the cyclical year called Vikrámá (7th November 1820), mortgaged, for Hons 36 and Falams 2½ (Rs. 145), to your elder brother Máhábaleshvarbhat my share in my muli-land, and my share in the allowances payable to the god Rámáthirtha, together with the profits which accrue from the Upádhiship to the god Shri Máhábaleshvar, with right to enjoy the same, and made over into your possession the said land, the allowances and the profits. Latterly I received from you (money in) cash, rice and other goods. Together with the value thereof, the debt is found, on account made up to this day, to amount to Hons 38 and Falams 6¼ [Rs. 154-8-0]; I have no other means whereby to pay you interest thereon. Therefore, as you have been enjoying all the property mentioned in the original mortgage-deed with the right to enjoy the same, passed by me, as also my house-site, and the rent, Hons 2 and Falams 2½ [Rs. 9], of my share due from Bélekan Jetti, so you may continue to enjoy the same in reduction of interest, as much as possible, on sums borrowed by me. I will manage the Pujáriship of the god Rámáthirtha, and the Upádhiship of the temple of Shri Máhábaleshvar. If I get a boy of my

liking for adoption, and make him my adopted son, I will pay you off, in one lump sum, Hons 36 and Falams 2½ due under the original mortgage deed and the money due under the second mortgage, together with interest remaining due, and redeem my share of land, allowances, profits aforesaid. In the event of my not adopting a son, my share of property, all muli-land, allowances, profits, &c., may be enjoyed by you in the same way as I did, in right of purchase for the sum, principal, and interest due to you. Even the Pujáriship of the god Rámáthirtha, and the Upádhiship of the god Shri Máhábaleshvar, so far as appertaining to my share, may be enjoyed by you. You are to enjoy the same from generation to generation. Thus I execute the second mortgage. The proceeding in respect of the house-site is also given into your charge. Thus I execute the second mortgage. The signature of Haribhat."

The Subordinate Judge held the suit barred, and rejected the plaintiff's claim. In appeal that decree was confirmed by the District Judge.

Shámráv Vithal, for the appellant:—Restrictions on the redemption of a mortgage are always discountenanced in equity. No agreement in a mortgage can make it irredeemable, either after the death of the mortgagor, or upon failure of issue male of his body, as held in *Howard* v. *Harris*.(1) The learned pleader also cited Fisher on Mortgages, page 278, Section 489, 2nd Edition.

Shántárám Náráyan, for the respondent.

WESTROPP, C.J.:—Although the deed of the 12th March 1832 (Exhibit 21) is on the face of it described as a mortgage, it is necessary to see whether its contents warrant that description. The grantee was already in possession under a mortgage of the 7th November 1820, and was under the new deed to receive the profits in liquidation of interest so far as they would go—and, as it appears to us, the grantor was not to be liable to repay the principal money, or such balance of interest (if any) as might accrue upon it, unless he adopted a son. We do not perceive how, so long as he remained without making such an adoption, the

(1) 1 Vern. 190; S. C 2 Wh. and Tud. L. C. 947, 3rd Ed.

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grantee could have maintained any suit against him either for principal or interest—(*vide Goodman* v. *Grierson*[1] and *per* Cotten ham L. C. in *Williams* v. *Owen* [2]). In *Howard* v. *Harris*[3] there was a covenant by the mortgagor to pay, upon which he might be sued by the mortgagee—a circumstance which distinguishes that from the present case. Here, in fact, there would not have been any debt whatever due from the grantor until he adopted a son, and the grantee, except in that event, would not have the usual remedies of a mortgagee. This, therefore, seems to us to be a case of a sale liable to be converted into a mortgage, and not like *Rámji* v. *Chinto*,[4] *Shankarbhái* v. *Kassibhái*,[5] and the cases there mentioned, which are instances of mortgages liable to be converted into sales. There has not been any adoption by the grantor here, and he could not have redeemed unless he adopted a son. For these reasons we affirm the decree of the District Judge with costs.

Decree affirmed.

[ORIGINAL CIVIL.]

Before Sir M. R. Westropp, Knight, Chief Justice, and Mr. Justice Green.

July 27.

THE LONDON, BOMBAY, AND MEDITERRANEAN BANK, LIMITED (PLAINTIFFS, APPELLANTS) *v.* BHANJI ZUTANI AND ANOTHER (DEFENDANTS, RESPONDENTS).*

Company—Contributory—Description—Balance order—List of contributories —Cause of action—Evidence—Amendment of plaint.

Where the holder of shares in a company was described in the list of contributories, against whom a balance order by the Court of Chancery had been made, as "Devji Bhánji, cotton merchant," and as being sued "in his own right,"

Held that the plaintiff company could not be allowed to give evidence that the shares were in fact held by a firm consisting of two individuals, named respectively Bhánji Zutani and Devji Hemráj; nor could the plaintiffs be allowed, at the hearing of the appeal, to amend their plaint, originally framed against both partners with a view to making the firm liable for the amount of the calls, so as to sue Bhánji Zutani only, who alone was alleged to have signed the articles and memorandum of association in the name of Devji Bhánji, and to make him personally liable as the holder of the shares. —*Weikersheim's Case* (L. R. 8 Ch. Ap. 831) distinguished.

(1) 2 B. and B. 274, 279.
(2) 5 My. and Cr. 303, 308.
(3) 1 Vern. 190.
(4) 1 Bom. H. C. Rep. 199.
(5) 9 Bom. H. C. Rep. 69.

* Suit No. 514 of 1875, Appeal No. 135.

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THE plaintiffs sued the defendants, Bhánji Zutani and Devji Hemráj, trading in co-partnership together under the style or firm of Devji Bhánji, to recover the amount of calls due on certain shares in the London, Bombay, and Mediterranean Bank, Limited, alleged by the plaintiffs to have been allotted to and held by the defendants. The suit was brought on a balance order of the Court of Chancery, dated 26th January 1871, made against the persons appearing in the list of contributories as holders of shares in the company. In the list of contributories the name of the holder of the shares in question was entered as "Devji Bhánji," who was also there described as "cotton merchant," and as being sued "in his own right." At the hearing before Sargent, J., several issues were framed, of which the fifth, the only one material for the purposes of this report, was as follows:—

"Whether the order of the 26th January 1871 constitutes a cause of action against the defendants or either of them."

Taylor, in opening the plaintiff's case, stated that, at the time the shares were applied for and allotted, the defendants Bhánji Zutani and Devji Hemráj were, as they still are, trading in partnership together, under the style of Devji Bhánji, as cotton merchants. The memorandum and articles of association were signed by Bhánji Zutani in the name of his firm Devji Bhánji.

SARGENT, J., on the statement of the plaintiff's case, dismissed the suit without going into evidence, on the ground that neither of the persons sued was the person whose name appeared on the list of contributories, and against whom the balance order had been made. The plaintiffs appealed.

Starling (with whom was *Taylor*) for the appellants:—A firm may be put on the list of contributories, and a balance order made against it, and the order, when made, may be executed by suit against the members of the firm, or by arrest of the members, or against their goods: *Weikersheim's Case*.[1] It is a well-known custom in this country for a firm of two individuals to be called by the first names of its two members. The firm Devji Bhánji is composed of the two individuals, Devji and Bhánji; therefore both Devji and Bhánji are, in fact, on the list of contributories. The learned Judge should have allowed evidence to have been given

[1] L. R. 8 Ch., Ap. 831.

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to show that Devji was, in fact, Devji Hemráj, and Bhánji was Bhánji Zutani, and that one of them was authorized to sign the name of the firm, Devji Bhánji, for the shares.

[WESTROPP, C. J.:—Looking only at the balance order it would appear that Devji Bhánji was a single individual. What you are asking us to do is substantially to amend the order of the Court of Chancery.]

The description only means that the trading party known as Devji Bhánji, whether individual or firm, carried on the business of a cotton merchant, and that is correct.

[GREEN, J.:—The description "cotton merchant sued in his own right" is not correct, if, as you say, what was meant was two cotton merchants sued as partners.]

The description was not invented by the plaintiffs or by the Court of Chancery. It was supplied by the defendants themselves when they signed the memorandum and articles of association.

[WESTROPP, C. J.:—We cannot assume that.*]

At all events, if either of the defendants signed the name Devji Bhánji, whether that were his own name or not, the plaintiffs would be entitled to go against him as Devji Bhánji. The learned Judge, therefore, should have heard the evidence and passed judgment against that one of the defendants who actually signed the name Devji Bhánji for the shares.

[WESTROPP, C. J.:—That would have been a variance from the case made by the plaint.]

But not from the issues. The issue on which the learned Judge decided the case was whether the balance order constituted a cause of action against the defendants *or either of them*. But to prove signature by one is, in fact, only part of the case made by the plaint, for as the plaint stands we should have had to prove signature, by one of the defendants, of the memorandum and articles of association, and that the other defendant was his

* On reference to the articles of association it was found that the signature "Devji Bhánji" was in Gujaráthi; and the description, also in Gujaráthi, might be translated either "cotton merchant" in the singular, or "cotton merchants" in the plural.

partner, and had authorized him to sign for the shares. Suppose we had succeeded only in proving the first point, we should still have been entitled to a decree against the one who actually signed, and the suit would have been dismissed as against the other. If necessary, I ask to amend the plaint now.

Mayhew and *Lang*, for the defendants, were not called on.

WESTROPP, C.J.:—The balance order of 26th January 1871 is a part of the record in Chancery, and as such "imports incontrovertible verity." In *Weikersheim's Case*[1] the Master of the Rolls did nothing contrary to what he found on the record, for the words Weikersheim & Co., in that case, implied the existence of more than one member of the firm; whereas the words here, "Devji Bhánji, cotton merchant," placed on the list "in his own right," imply the existence of only one individual trader.

What the plaintiffs ask us to do, is to allow them to give evidence for the purpose of showing that Devji Bhánji, of whom the balance order speaks as one man, in the singular, was, in fact, two men, in the plural, and thus virtually to amend the record of the Court of Chancery, which we cannot do.

Nor, having sued the two defendants as partners on a joint liability, can the plaintiffs now be permitted, in the same suit, to proceed against one whom they allege to have signed as Devji Bhánji. That is a wholly different case from the other, and if plaintiffs were to be allowed thus to have two strings to their bow, defendants would never know what case they had to meet. The plaintiffs commenced their suit against two individuals, and so stated their case to the learned Judge in the Court below. When they produced their balance order, they showed that the Court of Chancery had not made a firm, but a single individual, liable. They did not then ask to amend their plaint by making out a case against one only and striking out the other, but chose to retain both defendants on the record, and cannot be allowed to amend the plaint at this stage, and thus make quite a new case in the court of appeal. The decree must be affirmed with costs.

Decree affirmed.

(1) L. R. 8 Ch.. Ap. 831.

[APPELLATE CIVIL JURISDICTION.]

Before Sir M. R. Westropp, Kt., Chief Justice, Mr. Justice West, and Mr. Justice Pinhey.

1877 June 19.

MORU BIN PATLAJI (PLAINTIFF AND APPELLANT) *v.* GOPAL BIN SATU (DEFENDANT AND RESPONDENT).*

Plea of limitation under Act XIV of 1859—*Civil Procedure Code* (*Act VIII of* 1859), *Sections* 26 *and* 32—*Jurisdiction*—*Order of revenue officer*—*Cause of action.*

A defence of limitation under Act XIV of 1859 cannot be raised for the first time, after there has been a remand on special appeal from the decree of the court which has heard the cause on remand.

Munshi Buzl Ruheem v. *Sreenath Bose* (6 Calc. W. R. 178 Civ. Rul.) followed; *Kuria* v. *Gururáv* (9 Bom. H. C. Rep. 282) distinguished.

Parker v. *Elding* (1 East 352) and *Lila* v. *Vasudev* (11 Bom. H. C. Rep. 283), distinguished.

Semble, *per* WESTROPP, C.J., doubting *Saluji* v. *Rajsanji* (2 Bom. H. C. Rep. 162, A. C. J.), and *Davlata* v. *Beru* (4 Bom. H. C. Rep. 197, A. C. J.), the court ought not, even upon a special appeal in a case in which there has not been any remand, so to raise such question.

Per MELVILL, J.:—Cl. 16 of s. 1 of Act XIV of 1859 extends to all suits in which a declaratory decree, and nothing more, is sought.

Per NÁNÁBHÁI HARIDÁS, J.:—That clause does not extend to a suit in which the declaration sought is of a right in immoveable property.

MORU BIN PATLAJI and his two brothers sued Gopál bin Satu and eight others in the court of the Subordinate Judge at Rahimutpur in the district of Satárá, and prayed for a declaration that they were entitled to a half share in the *Pátilki vatan* of Kusbe Tárgáum. The plaint was filed on the 25th August 1871, and alleged that the plaintiffs enjoyed their half share in the *vatan* until their father's death in October 1864, and that, after that event, the Collector, by a letter dated the 30th June 1865, declared the plaintiffs to have only a fourth share in the *vatan*. The defendants only admitted the plaintiff's claim to a fourth share. The Subordinate Judge held the plaintiffs' claim proved, and made a declaratory decree in their favour, as prayed for in the plaint. In appeal, the Assistant Judge of Sátárá amended the decree of the first court, and in special appeal No. 269 of 1874 (which was preferred by the plaintiffs), a Division Bench of the High Court (Kemball and Nánábhái Haridás, J.J.), on the 26th Jan-

* Appeal No. 1 of 1876, under Section 15 of the Letters Patent, 1865.

uary 1874, remanded the case for the trial by the Lower Appellate Court of the particular issue stated in the following judgment:—"The plaintiffs in this case asked for a decree declaring them to be half owners of a *Pátilki vatan*. The Subordinate Judge admitted the claim, but, on appeal, the Assistant Judge, distinguishing between the *vatan* and the property and rights which constitute a *vatan*, and finding that the plaintiffs had proved their claim to a moiety of certain property and privileges only, gave a declaratory decree to that extent, amending the decree of the court of first instance accordingly; but it is clear that, in doing this, the Assistant Judge has gone outside the prayer contained in the plaint, and that, therefore, his decree cannot stand. It is suggested to us on behalf of appellants that in dissecting the *vatan*, and dealing with the component parts of it separately, the Assistant Judge has fallen into an error, which has affected his judgment on the general question submitted for adjudication. This may be so; but, at all events, it is for the Assistant Judge to consider whether the plaintiff has established his right to be declared an eight-anna sharer of the *vatan*, as stated in the plaint, without regard to any one particular right forming a portion of it, except as evidence of the general right set up, and to decide aye or no, passing a fresh decree in accordance with his finding. Reversed and returned. Costs to follow judgment."

On remand, the then Assistant Judge, Mr. Parsons, entirely confirmed the decree of the Subordinate Judge, and decided the case against the defendants. Thereupon the defendant Gopál bin Satu alone preferred a second special appeal, No. 207 of 1876. This appeal was heard on the 21st September 1876 by Melvill and Nánábhái Haridás, JJ. The principal points argued were whether the defendant Gopál could be permitted to plead limitation for the first time in the second special appeal, No. 207 of 1876, and whether the period of limitation applicable to the case was twelve years under Section 1, Clause 12, or six years under Clause 16 of the same section, of Act XIV of 1859.

Shántárám Náráyan (with him *Bhairavnáth Mangesh*) for the special appellant Gopál Satu.

V. N. Mandlik (with him *Shámráv Vithal*) for the special respondents.

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The arguments of the pleaders and the authorities cited by them in support of their contention are fully stated in the following judgments:—

MELVILL, J.:—In this case the plaintiffs ask for a declaration that they are entitled to a one-half share of a *Pátilki vatan*.

I understand that the plaintiffs are in possession of their half share of the land belonging to the *vatan*, and that their only grievance is that the defendants have induced the Collector to enter the plaintiffs' names as owners of only a one-quarter share of the *vatan*, the result of which is that they are allowed to appoint only one, instead of two, of the four officiating *pátils*. The object of this suit, therefore, is to obtain a declaratory decree, which may induce the Collector to recognize the plaintiffs' right to officiate equally with the defendants, or to appoint the same number of nominees.

It appears to me that such a suit is for a declaratory decree, and nothing more. It is not a suit for the recovery of any interest in immoveable property. If by any fiction it can be regarded in that light, then the interest which the plaintiffs seek to recover is the privilege of officiating more extensively than they have hitherto been allowed to officiate. If that be the meaning of the claim, then the answer to it is that the civil courts cannot entertain it. The civil courts may make a declaratory decree,—but any consequential relief must be sought elsewhere. It is for the revenue authorities to determine to what extent they will avail themselves of the services of the different *vatandars*, in the event of the sharers in the *vatan* being unable to agree as to the appointment of representatives.

Regarding the suit, therefore, as a suit for a declaratory decree, we are asked to hold that it is barred by limitation. The plaintiffs state in their plaint that their cause of action arose on the 30th June 1865, and the suit was filed on the 25th August 1871. Upon the face of the plaint, therefore, the right of action is barred by lapse of time, unless the period of limitation applicable to the claim exceeds six years. I am of opinion that, as no other limitation is expressly provided by Act XIV of 1859, a suit to obtain a declaratory decree, and nothing more, falls within the provisions

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of Clause 16 of Section 1 of the Act, and that the period of limitation is six years.[1]

The claim being barred on the face of the plaint, we are, I think, bound to reject the claim, although the objection of limitation has never been taken or considered before. The law says that no suit shall be maintained unless instituted within the period of limitation applicable to the suit. When it is brought to our notice, at whatever stage of the proceedings, that the suit is, upon the face of the plaint, one which the law does not allow to be maintained, we have no choice but to reject it. As was said by Lord Kenyon in *Parker* v. *Elding*: [2] "Here is a general law, of which we are bound to take notice, which says that no action shall be brought. How, then, can we say that the plaintiff shall recover against the positive direction of the Act?" I may refer to the following cases, as bearing upon the duty of the Court, to notice the law of limitation *ex mero motu*—*Saluji* v. *Rajsangji*,[3] *Payne* v. *Constable*.[4] And there are numerous cases which show that the point may be raised by the defendant at any time —see *Davlata* v. *Beru*.[5] I believe that this Court has always held that it is never too late for a defendant to raise the plea of limitation, provided that its validity be patent on the face of the proceedings, and that no further inquiry is necessary to establish it.

It has been urged upon us that, if the objection had been taken at the earliest stage of the proceedings, the plaintiffs might have been able to amend their plaint, or otherwise to show that their claim is within time. If it could be shown to us that, by any amendment of the plaint, the plaintiff's remedy might be secured, I would certainly, even at this stage, allow the amendment to be made. But the plaintiffs have distinctly stated that their cause of action against the defendants is that, by their opposition to the plaintiff's rights, the defendants induced the Collector to come to a certain decision prejudicial to the plaintiffs on a certain date. It is now suggested that the plaintiffs appealed to the Revenue Commissioner against the Collector's order, and that the question

(1) *Bhikaji* v. *Jagannáth*, 10 Bom. H. C. Rep. 351; *Mrinmoyee Dabea* v. *Bhoobunmoyee Dabea*, 15 Beng. L. R. 1.
(2) 1 East 352.
(3) 2 Bom. H. C. Rep. 162.
(4) 1 Beng. L. R. 49, O. C. J.
(5) 4 Bom. H. C. Rep. 197, A. C. J.

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was pending before the Revenue Commissioner until 1868. Assuming that this statement is correct (though it is not supported by affidavit, or by any evidence), I do not see how the circumstance could operate to postpone the plaintiff's cause of action against the defendants. The fact that the plaintiffs applied to the Revenue Commissioner to remedy the injury inflicted upon them, and that the Revenue Commissioner refused to do so, cannot alter the date on which the injury was inflicted.

For these reasons I have come unwillingly to the conclusion that we are bound to reject the claim, as barred by lapse of time. But as the defendants ought to have taken the objection at the earliest opportunity, and all the subsequent proceedings would then have been prevented, I am of opinion that they must bear the costs of those proceedings, and that the plaintiffs should be burdened with only so much of the costs as they would, in that event, have been liable to pay,—that is to say, the amount of the institution fee on the plaint.

NANABHAI HARIDÁS, J. :—I am unable to agree with my brother Melvill in his view of the case. I think we must confirm the concurrent decision of the courts below, declaring that the plaintiffs are entitled to half the *Pátilki vatan* of Tárgáum.

The question of limitation was not raised in either of the lower courts, nor in this court when the case came up in special appeal and was remanded to the Assistant Judge on the 26th November 1874. It was not raised before the Assistant Judge when he reheard the case on remand. The defendants, therefore, may fairly be considered to have waived any objection to the plaintiff's claim on the ground of limitation, and ought not to be permitted to raise it now for the first time in this second special appeal to us. In a case, not quite so strong as the present one, the Calcutta High Court considered that the Lower Appellate Court had properly refused to allow the question of limitation to be raised for the first time after the case had been tried on the merits on remand,[1] and a Division Bench of this court (consisting of the Chief Justice and myself) has recently refused to allow it when it was passed

(1) *Moonshee Buzl Ruheem* v. *Huranath Acharjee*, 6 Calc. W. R. 178 Civ. Rul.; see also *Sreemutty Beedhoo* v. *Muddun Gopál*, Calc. W. R. 1864, 207 Civ. Rul.; and *Bechoo Misser* v. *Ramadheen Misser*, Id. 212.

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over in the court below.[1] The rule we have generally observed on this side of the court is not to allow a point, not taken in the lower courts, to be taken for the first time in special appeal—see *Máhádáji* v. *Vyankáji*,[2] and *Ramábái* v. *Appá*.[3] In the case of *Máhádáji* v. *Vyankáji*,[4] the point raised for the special appellant was purely one of law, founded upon the respondent's own admission in his plaint, and yet was disallowed as being "too late." Any relaxation of this rule would cause much inconvenience; and I do not think the appellant in this case is entitled to any indulgence. Still, as the question of limitation has been argued before us, and as I am unable to agree with my brother Melvill, who considers this suit barred by limitation, I will shortly state my own opinion upon it.

The plaintiffs sue for a declaration that they are entitled to a half of the *Pátilki vatan* of the village of Tárgáum. They state how they are obliged to bring this suit in consequence of the defendants' denial of such their right before the Collector, and in consequence of the latter's action upon such denial. It is not disguised that their ultimate object, if they succeed in getting the declaration they seek now, is, by means of it, to obtain some redress at the hands of the revenue authorities; but with that object we have nothing to do. Upon the facts found by the lower courts the plaintiffs are clearly entitled to the declaration they seek, unless their claim is barred by the law of limitation; and I do not think that it is so barred.

It is urged for the appellant that, as this is a suit merely for a declaration of right and not for possession of any property, it is barred by Clause 16, Section 1, Act XIV of 1859, the plaint having been filed more than six years after the 30th June 1865, when, according to the plaintiffs' own admission in their plaint, their cause of action arose; and in support of this contention we are referred to the case of *Mrinmoyee Dabea* v. *Bhoobunmoyee Dabea*.[5] But I do not think that case can govern this. It was a suit to obtain a declaration that a certain adoption was invalid, and not one, as the present is, to obtain a declaration that the plaintiff was entitled

(1) Special Appeal, No. 84 of 1876, *Khashaba* v. *Collector of Puna*, decided 13th September 1876, p. 207 of printed judgments, 1876, not reported.

(2) I. L. R. 1 Bom. 197.

(3) 12 Bom. H. C. Rep. 13.

(4) I. L. R. 1 Bom. 197.

(5) 15 Beng. L. R. 1.

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to any share in immoveable property. The plaintiff's contention there was that, as it was "only a declaratory suit," and as there was "no provision in Act XIV of 1859 for such a case," the Limitation Act did not affect it at all; and the court held that the Legislature intended to provide a limitation for every suit, and that the words of Clause 16, Section 1 of that Act, were so general that it saw no ground "for saying that a declaratory suit such as this is, namely, to declare that there is no valid adoption, does not come within it." I do not understand that case as laying down the broad proposition of law the appellant here contends for, that for all declaratory suits the period of limitation is six years. The words above quoted from the judgment seem to me to show beyond a doubt that what the court had before its mind was only a suit to declare an adoption invalid, and that it did not mean to lay down any rule as to suits of a different description. I do not, therefore, think that that case has any application to the present one, in which the plaintiffs seek a declaration of their right to the *vatan* in dispute.

I have always understood twelve years, under Clause 12, Section 1 of Act XIV of 1859, to be the limitation applicable to suits like the present. If Clause 12, Section 1, applies to such suits, the application of Clause 16 of that section is necessarily excluded by its very terms. The following cases will show that Clause 12 of that section has always been applied to such suits.

Krishnabhat v. *Kapabhat*[1] was a suit in which the plaintiff sought to establish his right to the office of hereditary priest to a temple. The court held, reversing the decrees of both the lower courts, that the office was immoveable property, and that, therefore, the suit "should be held to be within Clause 12 of Section 9 of Act XIV of 1859....." Gibbs, J., in his judgment refers to a previous case, S. A. No. 425 of 1886, in which, he says, he and Mr. Justice Tucker had held the same, namely, that a claim "to establish a right" to the privileges and precedence attached to a hereditary office "came under Clause 12, Section 1 of the Limitation Act."

In *Balvantráv* v. *Purshotam*[2] a Full Bench, consisting of Westropp, C.J., and Gibbs, Lloyd, Melvill and Kemball, JJ.,

(1) 6 Bom. H. C. Rep. 137, A. C. J. (2) 9 Bom. H. C. Rep. 99.

approved and followed the decision in *Krishnabhat* v. *Kapabhat*[1] holding "that Clause 12, and not Clause 16, of Section 1 of Act XIV of 1859 is applicable to a suit to recover the fees of an hereditary office, such as a village *Joshi*." There the right to the office itself was in contest between the parties.[2]

The principle laid down in these cases has been approved by the Privy Council.[3]

Numerous other cases will be found laying down that for suits to declare the right to a *vatan* the limitation is twelve years under Clause 12, Section 1 of the Act; but it is unnecessary to refer to any more. It would appear that, even though no possession was asked for, where suits were brought to obtain mere declarations in respect of other kinds of immoveable property, twelve years' limitation has been applied.[4]

Suits to declare the right to hold lands free from Government assessment are governed by twelve years' limitation.[5]

For suits to establish a charge or lien on land the limitation is twelve years.[6]

Suits to declare unauthorized alienations of land void are also held to be governed by the same limitation of twelve years: *Beer Pershad* v. *Doorga Pershad*;[7] *Moonshee Syed Ameer Ali* v. *Mohendronath Bose*;[8] *Jeonath* v. *Roopa*;[9] *Rash Behari Lall* v. *Burmessur Nauth*;[10] *Bishonath Burmah* v. *Shreemutty Shushee Mookhee*.[11] I know of only one case, *Bhikaji* v. *Jagannath*,[12] in which it would appear to have been laid down that "a suit by a reversioner, during a widow's lifetime, to obtain a declaration that a conveyance made by her is void, must be brought within six years from the date of the conveyance—Act XIV of 1859, Section 1, Clause 16."[13] The Calcutta cases above referred to do not appear to have been cited or considered by the learned Judges in that

(1) 6 Bom. H. C. Rep. 137 A. C. J.
(2) 10 Bom. H. C. Rep. 287, note.
(3) *In Máhárána Fatesangji v. Desai Kallianrayaji*, 10 Bom. H. C. Rep. 281.
(4) 3 Calc. W. R. 6, Act X Rul.; 17 *Ibid.* 281 Civ. Rul.; 18 *Ibid.* 21 Civ. Rul.; 19 *Ibid.* 33 Civ. Rul.; 21 *Ibid.* 178 (P. C).
(5) 11 Bom. H. C. Rep. 1.
(6) See 8 Calc. W. R. 51 Civ. Rul.; 9 *Ibid* 170 318, 2 Mad. H. C. Rep. 51, 307; 3 *Id.* 92; 3 *Id.* 364, 8 Bom. H. C. Rep. 61, A. C. J., 9 *Id.* 53.
(7) Calc. W. R. 1864, 215 Civ. Rul.
(8) 2 Calc, W. R. 271, Civ. Rul.
(9) *Ibid.* 273, note.
(10) 10 *Id.* 30 Civ. Rul.
(11) 20 *Id.* 1 Civ. Rul.
(12) 10 Bom. H. C. Rep. 351.
(13) *Ibid.* 353.

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case, and, if the point arose before me, I should probably be disposed to take a different view of the law. The rule which, in my opinion, is fairly deducible from the above and other decided cases, is that Clause 16, Section 1 of Act XIV of 1859, does not apply to all declaratory suits; that to suits in which a declaration of right to any immoveable property is sought, the limitation prescribed in Clause 12 of that section applies; and that to all other declaratory suits, not otherwise provided for in the Act, the limitation in Clause 16 applies.

Such being my view of the law of limitation applicable to declaratory suits, I would confirm with costs the decrees of the lower courts, and declare that the plaintiffs are entitled to a moiety of the *Pátilki vatan*, whatever it consists of, such declaration not to interfere in any way with the Collector's authority to appoint whomsover he chooses to officiate as *Patil* under the existing law on that subject.

The Judges being thus divided in their opinion, the plaintiff Moru preferred the present appeal under the amended Letters Patent, 1865, Section 15.

Shámráv Vital for the appellant.

Shántárám Náráyan, who, with *Bhairavnáth Mangesh*, appeared for the respondent Gopál bin Satu (defendant), cited *Kuria* v. *Gururáv*[1] and *Lila Morji* v. *Vásudev Moreshwar*[2] in support of the argument that the defendant was not estopped from pleading limitation in the second special appeal, as the suit appeared to be barred on the face of the plaint, and, consequently, no remand was necessary.

The judgment of the Court was delivered by

WESTROPP, C. J.:—The plaint, which was presented upon the 25th August 1871, states that the cause of action accrued on the 30th day of June 1865. The defendant (who was the special appellant) contends that this is merely a suit for a declaratory decree, and, as such, falls within Clause 16, Section 1 of Act XIV of 1859, and, not having been brought within six years of the alleged accruer of the cause of action, is barred, inasmuch as, he argues, that six and not twelve years is the period of limitation for

(1) 9 Bom. H. C. Rep. 282. (2) 11 Bom. H. C. Rep. 283.

declaratory suits, even though they should relate to immoveable property. The members of the Division Court differed in opinion —Mr. Justice Melvill holding that the plea of limitation was in time, and that Clause 16, Section 1 of Act XIV of 1859 and not Clause 12, Section 1, was the enactment applicable to such a declaratory suit as the present suit, which, therefore, was barred. Mr. Justice Nánábhái Haridás held that the plea of limitation was too late, and, further, that, even if that were not so, the period of limitation was twelve and not six years, and hence the suit was not barred. Mr. Justice Melvill, being the senior Judge, the decree was made pursuant to his views, reversing the decree of the Assistant Judge, and rejecting the plaintiff's claim as barred by Act XIV of 1859, Section 1, Clause 16.

The plaintiff has appealed under Section 15 of the High Court Charter of 1865. That appeal has been heard by my brothers, West and Pinhey, and myself.

None of the defendants in their written statements by way of defence raised the question of limitation, nor did they, or the Subordinate Judge who first tried the case, or Mr. Hosking, who heard the appeal from his decision, raise that question. Nor was it raised on the special appeal from Mr. Hosking's decree heard by Kemball and Nánábhái Haridás, JJ., sitting as a Division Bench of this court. They reversed Mr. Hosking's decree, and remanded the cause for the Assistant Judge to consider whether the plaintiff had established his right to be declared an eight-anna sharer in a *Pátilki vatan*, as stated in the plaint, "without regard to any one particular right forming a portion of it, except as evidence of the general right set up, and to decide aye or no—passing a fresh decree in accordance with his finding." No application for review of their decree, or appeal against it to Her Majesty in Council, has been made. That decree evidently limited within strict bounds the inquiry which the District Court, to which the cause stood remanded, was at liberty to institute on the new trial, and that court could not then have entertained the question of limitation. That being so, the circumstance, that Mr. Parsons, the Assistant Judge, who heard and decided that case on remand, did not raise or enter upon that question and decide it in favour of the defendants, does not constitute any valid objection to his decree on special appeal

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against it, and it was not, in our opinion, competent for the High Court on such special appeal to permit the defence of limitation to be raised. In *Munshi Buzl Ruheem* v. *Shreenath Bose*(1), Peacock, C.J., and Shumboonath Pandit, J., where a cause had been remanded by the District Court on a point affecting the merits, and the defendant, after that point had been determined against him by the Principal Sadr Amin, made a second appeal to the District Court, and then, for the first time, raised the defence of limitation, held that the last-mentioned court properly refused to enter upon that question. In *Kuria* v. *Gururáv*(2) the effect of a previous remand for the trial of a special issue in limiting the scope of this court's action, when the cause comes again before it on special appeal from the decree made by the lower court on remand, was not discussed, and that case, therefore, cannot be regarded as an authority on that point.

The Civil Procedure Code, Section 26, requires that the plaint should state the cause of action and when it accrued, and the 32nd Section enacts that "If upon the face of the plaint, or after questioning the plaintiff, it appear to the court that the subject matter of the plaint does not constitute a cause of action, or that the right of action is barred by lapse of time, the court shall reject the plaint: provided that the court may in any case allow the plaint to be amended if it appear proper to do so. As a matter of fact, the court of first instance did not reject the plaint when presented to it, and it is quite possible that the court refrained from so doing, notwithstanding the statement in it that the Collector's letter of the 30th June 1865 was the cause of action because the court perceived that no letter from the Collector or other revenue officer could constitute a cause of action against the defendants who were other persons, and that the real cause of action was the disturbance of the plaintiff in his share of the *Pátilki vatan*, the actual time of which disturbance does not appear upon the face of the plaint, although the dates of the various orders of the Mámlatdár, Collector, and Revenue Commissioner may do so. The actual disturbance would be the first time that the defendants appropriated to themselves any portion of the *vatan* which the plaintiff ought to have received. But

(1) 6 Calc. W. R. 178 Civ. Rul. (2) 9 Bom. H. C. Rep. 282.

whether or not this was the reason which influenced the court of first instance in accepting the plaint without objection as to limitation, or requiring amendment, we, for the reason already stated, do not think that the defence of limitation can be raised for the first time after there has been a remand and on a special appeal from the decree of the court which has heard the cause on remand. If it do not appear to the court, either on the face of the plaint or from the plaintiff when questioned, that the suit is barred by limitation, there is nought in the Civil Procedure Code to show that the court of first instance, or other courts on appeal, should *ex mero motu*, without plea, raise the question of limitation. And, speaking for myself alone, I reserve the right to consider whether, even upon a special appeal, in a case in which there has not been any remand, I should follow *Saluji* v. *Rajsanji*[1] and *Davlata* v. *Beru*.[2] There having, however, been a remand in this case, it was not, we think, competent for the Division Bench, to which there was a special appeal from the decree made on such remand, to permit the defence of limitation to be raised for the first time. To decide this case then upon that ground was virtually to review the decree of the Division Bench, which made the order of remand on the special question already mentioned. For, if the point of limitation were good, the Division Bench should have disposed of the case on that ground, and not have remanded the cause, as it did. One Division Bench has, we think, no authority thus to review the decree of another Division Bench. And it is clearly objectionable that, after the parties have been four times contesting the case on the merits, the defendant should, on the fifth occasion, treat all that had gone before as so much time wasted, and should raise the defence of limitation which naturally ranges itself under the category of preliminary objections to the suit, and, if not discovered and taken by the court at the first stage of the suit, as pointed out by Section 32 of the Civil Procedure Code, should be made by the defendant at the earliest opportunity afterwards, in order to prevent the waste of time and money which a different course would entail. I am now considering this matter with reference only to Act XIV of 1859, as taken with Act VIII of 1859, Sections 26 and 32, and not expressing any opinion upon the construction of Act IX of 1871, Section 4.

(1) 2 Bom. H. C. Rep. 162, A.C.J. (2) 4 Bom. H. C. Rep. 197, A.C.J.

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Parker v. *Elding*,(1) which has been mentioned, was a case of jurisdiction not limitation, and the objection of want of jurisdiction appeared on the record. In *Lilá Moroji* v. *Vásudev Moreshwar*(2) not only does the order of remand appear to have been for a new trial on the merits at large, but the ground on which the High Court dismissed the suit, when the decree made on remand was specially appealed against, was that there was no cause of action whatever —the right to redeem not having accrued when the suit was instituted—a very different ground from limitation. Under such circumstances it would have been impossible to have made a decree for the plaintiff there.

In *Gopálráv* v. *Bhavánráv*(3) a party who had failed to dispute the jurisdiction in the court of first instance, the District Court, and on special appeal to this court, was held estopped from denying the jurisdiction when the cause subsequently came before this court on a fresh special appeal. See also *Ex parte Manohar Bhivráv*(4) and *Trilochun Doss* v. *Gugun Chunder Dey*.(5) In the Palitana case (*Ladkuverbái* v. *Ghoel Shri Sarsangji Pratabsangji*(6) the defendant had throughout the proceedings disputed the jurisdiction,—a circumstance which completely distinguishes that from the other cases now mentioned.

We, for the foregoing reasons, reverse the decree of the Division Bench of the 21st September 1876, and restore that of the Assistant Judge, Mr. Parsons, of the 18th January 1876, and direct the respondent (defendant) Gopál bin Satu to pay the costs of his special appeal (207 of 1876), which for the first time raised the defence of limitation, and the costs of this appeal from the decree of the Division Bench on that special appeal.

Decree of the Division Bench reversed, and that of the Assistant Judge restored.

(1) 1 East 352. (2) 11 Bom. H. C. Rep. 283.

(3) Special Appeal No. 373 of 1873, decided by West and Nánábhái Haridás, JJ., 18th November 1874, p. 279 of printed judgments for 1874, not reported.

(4) 2 Bom. H. C. Rep. 374. (5) 24 Calc. W. R. 413., Civ. Rul.

(6) 7 Bom. H. C. Rep. 150, 164, O. C. J.

[APPELLATE CIVIL JURISDICTION.]

Before Mr. Justice West and Mr. Justice Pinhey.

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July 11.

JAMNADAS SHANKARLAL AND VRIJBHUKHAN SHANKARLAL (DEFENDANTS, APPELLANTS) *v.* ATMARAM HARJIVAN (PLAINTIFF, RESPONDENT).*

Ancient lights—Obstruction—Notice—Delay—Acquiescence—Mandatory injunction—Damages—Demolition of building—Professional assistance.

The re-erection of his house by the defendant, notwithstanding notice from the plaintiff, so as to darken some of the principal rooms of the plaintiff's house, making them unfit for occupation during the day without artificial light, is an injury which cannot be adequately redressed by an award of damages, and against which the court will grant relief by issuing a mandatory injunction, directing the defendant to pull down so much of the house as is necessary to stop the injury.

The probability of the defendant suffering a greater loss by the demolition of his house than the plaintiff, if his claim could be reduced to money, would suffer by being awarded a money compensation, is no ground for depriving the plaintiff of a mandatory injunction in his favour, except under special circumstances.

To determine what demolition of the house is necessary, the court executing the decree was directed to employ a professional man agreed on by the parties if they could agree, or nominated by the court if they could not.

Circumstances constituting delay and acquiescence discussed.

THIS was a special appeal from the decision of E. Hosking, Esq., Assistant Judge at Thánáá, confirming the decree of Ráo Sáheb Mangeshráv Balwant, Subordinate Judge of Thánáá.

The plaintiff and the defendants are owners of neighbouring houses in the town of Thánáá. In the beginning of February 1872 the defendants pulled down their house, and digging a new foundation began to re-build it. On the 14th of February 1872 the plaintiff served a notice on the defendants, stating that he understood they were going to build their house higher than before, and warning them not to obstruct the access of light and air to his house. On the 9th of March following, the plaintiff, in a second notice, again warned the defendants that they would be answerable for any injury to the plaintiff's house. Notwithstanding this, the defendants went on building their house with the space of one foot between it and that of the plaintiff, but raised it higher than the plaintiff's house, and higher than their own former house.

* Special Appeal No. 39 of 1876.

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The roof of the new house thus overhung a part of the plaintiff's roof, and to make room for their roof, the defendants cut some of the rafters of the plaintiff's roof. The defendants, in digging the foundations of their new house, also caused some damage to the plaintiff's walls. The defendants also opened some windows looking into the plaintiff's house. The plaintiff, on the 7th of October 1873, *i.e.*, about a year after the completion of the defendants' house, brought this suit to obtain a mandatory injunction, directing the defendants to pull down their house which had completely darkened some of the large rooms of the plaintiff's house, to obtain damages for injury done to the plaintiff's roof and wall, and to have the newly-opened windows closed up.

The defendants denied that any injury had been caused to the plaintiff.

The Subordinate Judge found that the plaintiff's uninterrupted enjoyment of light and air for a period of forty years had been obstructed, his principal rooms having become uncomfortably dark, and that the digging of the new foundation by the defendants had caused damage to the plaintiff's wall. He was further of opinion that to grant adequate relief to the plaintiff the defendants' house should be pulled down to its former height. He, therefore, gave a mandatory order to that effect and awarded 300 rupees damages.

The Assistant Judge agreed with him generally, and confirmed his decree.

Macpherson (with him *Pándurang Balibhadra*) for the special appellants:—The principles on which a mandatory injunction is granted are fully discussed in *Smith* v. *Smith*[1] and *Bottlewalla* v. *Bottlewalla*.[2] The Assistant Judge, in disposing of this case, mainly relies on the decision of Lord Westbury in the case of *Jackson* v. *The Duke of Newcastle*,[3] but this is not of general application. As pointed out in *Vishnu Lakshmán Bhagát* v. *Balkrishna Vithal Bhagát*,[4] "it does not follow that, because the plaintiff has a legal right to the removal of the building erected by the defendant over the joint wall, a court of equity will, therefore,

(1) L. R., 20 Eq., 500. (2) 8 Bom. H. C. Rep. 181, O. C. J.

(3) 33 L. J. Ch. 698.

(4) Special appeal No. 375 of 1875, decided by Melvill and Kemball, JJ., on 13th June 1876, p. 89 of printed judgments for 1876, not reported.

order its removal." The plaintiff in this case did not sue till a year after the completion of the defendants' building. There was, therefore, such a delay on his part as deprived him of his right to an injunction. He had thus acquiesced. As to the comparative loss to the parties, there is no doubt that the defendants' loss will be much greater than that of the plaintiff.

Shántárám Náráyán for the special respondent :—The principle laid down by Lord Westbury in *Jackson* v. *The Duke of Newcastle*[1] has been widened by more recent decisions to possible prospective cases. There was neither delay nor acquiescence on the plaintiff's part, as he took steps immediately after the defendants began their house. It was their own fault in persisting after notice by the plaintiff: *Bhuban Mohan Banerji* v. *Elliott*.[2] When a term of limitation is prescribed by law, that term is not to be abridged by equitable considerations. The plea of acquiescence is applicable to suits for which a fixed term of limitation is prescribed by law, but mere delay does not constitute acquiescence: *Uda Began* v. *Imám-ud-din*.[3] The reason that the pulling down of the building will cause greater loss to the defendants does not hold good where the building is proceeded with after protest: *Senior* v. *Pawson*.[4]

Macpherson in reply :—A distinction exists between delay and acquiescence. Every case must be decided on its own merits: *Isenberg* v. *East India House Estate*.[5] If the court does think fit to grant a mandatory injunction, the court will direct that a professional man may be called in to state how much of the defendants' house should be demolished.

The judgment of the court was delivered by

WEST, J. :—The defendants Jámnádás and his brother being minded to re-build their house, which lay contiguous to that of the plaintiff, commenced the requisite works in January or February 1872. The plaintiff Atmárám being apprehensive of injury to his house, through an obstruction to his upper windows, delivered to the defendants the notices, Nos. 34 and 35, dated, respectively, the 14th February and 9th March 1872. The defendants proceeded,

(1) 33 L. J., Ch. 698.
(2) 6 Beng. L. R., 85.
(3) I. L. R., 1 All. 82.
(4) L. R. 3, Eq. 330.
(5) 33 L. J., Ch. 392.

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notwithstanding these notices, to re-erect their house at a distance of one foot from Atmárám's, and carrying it up beyond its former height, they have so obstructed the plaintiff's windows that "the two central rooms on the east side of his house, on the second floor, have been made unfit for occupation in the day time without artificial light." The Assistant Judge holding that the plaintiff's property had thus been rendered "in a material degree unsuitable for the purposes to which it is now applied," followed Lord Westbury in *Jackson* v. *The Duke of Newcastle*,(1) in pronouncing the injury one that did "not admit of being measured and redressed by damages," and directed the defendants to reduce their new structure to such a height as should prevent its interfering with the plaintiff's ancient lights. In this court the injury and the right to redress have not been disputed; but it has been urged, first, that the injury was in its nature such that the proper remedy was an award of damages, or, at any rate, that the finding of the lower court was not distinct that such an award would not satisfy the justice of this particular case; and, secondly, that, even if a mandatory injunction might originally have been with propriety demanded and granted, yet the delay of the plaintiff in not filing the present suit until the 7th October 1873, almost a year after the completion of the defendants' house, was of itself such an encouragement to the defendants to proceed with their building and to retain the advantage they had thus gained, that at the present stage, at any rate, an injunction ought to be refused; thirdly, it has been urged that the much greater injury that will arise to the defendants from the demolition of their building than to the plaintiff from his being compelled to accept pecuniary compensation is an additional and strong reason for the court's awarding damages only.

As to the first point, we think that the injury, as described by the Assistant Judge and the Subordinate Judge after an inspection of the premises, was clearly such that we cannot for a moment say that their findings on that subject are opposed to the facts proved in the case or unsupported by evidence. The complete darkening of some of his principal rooms is a serious injury to the plaintiff, and one which he cannot, with any justice, be forced to

(1) 33 L. J., Ch. 698.

submit to in consideration of some money compensation guessed at by the courts as a possible equivalent. The principle of law, which the Assistant Judge has applied to the facts, appears to have been widened, but in no respect narrowed by more recent decisions.(1) The case is one, we think, which falls within the ruling in special appeal 293 of 1873, and many others to the same effect in this court, and one, therefore, in which a mandatory injunction was the proper relief for the plaintiff to seek.

The delay of the plaintiff in bringing his suit may be looked at from two points of view: Did it imply anything like acquiescence? Did it, apart from acquiescence, materially weaken the plaintiff's claim to the relief that he seeks? To the first question the plaintiff's whole course of proceeding furnishes an emphatic answer in the negative. The defendants having disturbed his foundations and upset the wall of his house, Atmárám took proceedings against them in the criminal court. He complained also of the rafters of his house having been cut by the defendants to make room for their new edifice. These proceedings were going on until December 1872, and the notices given at an earlier stage were not withdrawn or qualified. There was no acquiescence, therefore, on the plaintiff's part in the defendants' proceedings. They could not, at any moment before the completion of their building in October or November 1872, have said that they had been induced to do anything by an idea of the plaintiff's assent caused by his own acts or omissions; subsequently to that date there was no material change in the defendants' position which was induced or could have beeen induced by the plaintiff's omitting to pull down their new walls or to apply to the court to have them pulled down. In the language of Blackburn, J., in *Bennison* v. *Cartwright*,(2) "The interruption was acquiesced in so far as that the wall was allowed to remain standing, but . . . . . the plaintiff was protesting against his rights being interfered with," that is, there was no acquiescence at all; though there was, as to one kind of proceeding, acquiescence or forbearance which, in the absence of explanatory circumstances, might have been an impediment to the assertion of the plaintiff's right.

(1) See Bom. H. C. Rep. 184, O. C. J.; *Smith* v. *Smith* L. R., 20 Eq. 500; *Aynsley* v. *Glover*, L. R., 18 Eq., 544.

(2) 33 L. J. Q. B. 137.

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Putting acquiescence, however, out of the question, has the plaintiff's delay disentitled him to the relief which he originally might have claimed? Down to October and even to December 1872 he appears to have been in a continual struggle with his encroaching neighbours. In the meantime their house had been completed. His legal right to relief would continue until it was barred by limitation, and the courts could not properly impose any shorter period for its assertion. All that is urged is, that the discretional power of the court as to mandatory injunctions should not, on account of the subsequent delay, be exercised in his favour, or rather that it should be exercised in favour of the defendants. But it is not shown or suggested that this delay has in any way prejudiced them. The supreme importance of this consideration is insisted on by the Privy Council in the judgment in *Lindsay Petroleum Company* v. *Hurd*,[1] "Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct or neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted; in either of these cases lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable." Taking it as a point determined, that the plaintiff's delay down to the end of 1872 was sufficiently covered by the other proceedings in which he was engaged, his delay from that time down to October 1873 does not, under the circumstances, afford any reason for curtailing his prior right to redress.[2] The defendants have had a somewhat longer enjoyment of their new building and of the luxury of annoying the plaintiff; but that is not a ground for refusing him the appropriate relief, where no new rights and interests have meanwhile come into existence.

It appears probable that the defendants will suffer more by the demolition of their house than the plaintiff, if his claim could be

(1) L. R., 5 P. C., 239. (2) See *Durell* v. *Pritchard*, L. R., 1 Ch., 244.

reduced to money, would suffer by being awarded merely a money compensation. But this is, except under special circumstances,(1) no ground for depriving a plaintiff of the relief to which he is otherwise legally or equitably entitled. Here the defendants knew that they were doing wrong. They chose to go on in spite of the plaintiff's notices. They ran the risk with their eyes open; they cannot complain if they suffer through an ill event which they deliberately courted. The plaintiff has sustained an injury which can be effectually remedied in only one way, and to that one way the defendants, as wilful wrong doers, must submit.

Mr. Macpherson has not been able, on behalf of the defendants, to adduce any instance amongst the numerous cases to which he has called our attention, in which, after full notice that the plaintiff would take legal proceedings in the event of an injury to his property, he has been deprived of any portion of his remedy against a defendant through a mere delay in bringing his suit, not being such as to induce a reasonable supposition of final acquiescence, or one in which, under the same circumstances, the mere comparative greatness of the defendant's loss was allowed to liberate him from the ordinary consequences of wilful encroachment and wrongdoing.

For these reasons we must confirm the decree of the Assistant Judge. We add only a direction that, in executing that decree, the court is to employ a professional man, agreed on by the parties if they can agree, but if not, then one nominated by itself, to determine what demolition is necessary to give effect to the decree in the way least injurious to the defendants.

Costs to be borne by the special appellants.

Decree affirmed.

(1) As in *Senior* v. *Pawson*, L. R. 3 Eq. 330.

[APPELLATE CIVIL JURISDICTION.]

Before Sir M. R. Westropp, Knt., Chief Justice, and Mr. Justice Melvill.

1877. July 30.

NA'RA'YAN BHA'RTHI (PLAINTIFF AND APPELLANT) v. LAVING BHARTHI AND OTHERS (DEFENDANTS AND RESPONDENTS.)*

Hindu Law—Illegitimacy—Succession—Gosavis—Custom—Maintenance.

The illegitimate son of a married woman by a *Gosavi* with whom she is living in adultery while undivorced from her lawful husband, cannot inherit his father's property.

A custom recognizing a right of heirship in an illegitimate son by an adulterous intercourse would be bad.

The right of an illegitimate son to maintenance out of his deceased father's property, cannot be decided in a suit which concerns a portion only of that property, and to which all persons in possession of the rest of the father's property are not parties.

THIS was a special appeal from the decision of J. W. Walker, Assistant Judge at Ahmedabad, reversing the decree of Motilál Lalbhái, 2nd Class Subordinate Judge at Borsad.

The plaintiff, Náráyan Bhárthi, sued to recover possession of a house, as the son and heir of Lilá Bhárthi, a *Gosávi*, to whom the plaintiff alleged the house to have belonged. The defence among other things was that the plaintiff, being illegitimate, was not entitled to inherit from Lilá Bhárthi. The court of first instance awarded the plaintiff's claim. In appeal, however, the Assistant Judge reversed that decree on the ground that the plaintiff was not Lilá Bhárthi's heir. He observed:—

"The judgment of the lower court shows that plaintiff's mother was not married to his father Lilá Bhárthi, and that at the time of his birth his mother was a married woman, living in adultery with Lilá Bhárthi, as she had not obtained a divorce from her husband. This finding is fully supported by the evidence, and is not, in fact, appealed against. Such being the case, the decision in *Rahi* v. *Govind*(1) exactly applies, and it must be held, in accordance with that decision, that the plaintiff, the child of an adulterous, intercourse, cannot succeed as heir of Lilá Bhárthi his father."

* Special Appeal No. 124 of 1877. (1) I. L. R. 1 Bom. 97.

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Shántárám Náráyan for the appellant:—The Assistant Judge is wrong in deciding the present case on the authority of *Rahi* v. *Govind*.(1) That case, no doubt, lays down the law which governs the Hindus generally, but does not apply to the case of Gosávis like the present. The right of inheritance and succession among the members of this religious sect is subject to special usages and customs, as appears from 1 West and Bühler, pp. 257—269, and Steele's Law and Customs of Hindu castes. App. tit. Gosávis, Secs. 20, 29, 40, 49.

Nánábhái Haridás, Government Pleader, for the respondent, was not called upon.

WESTROPP, C.J. :—We concur with Mr. Walker in thinking that the principle decided in *Rahi* v. *Govind*(1) is applicable to Gosávis. None of the passages from Steele or 1 West and Bühler, cited by the learned pleader of the plaintiff, show the contrary. The alleged custom amongst Gosávis to recognize a right of heirship in the son of a Gosávi by a woman, who, in the lifetime of a previous husband, and without his consent, has married the Gosávi, would be a bad custom, and such as could not be treated by courts of justice as valid—*Reg.* v. *Karson Goja*.(2) The plaintiff, although the son of Lilá Bhárthi, being the offspring of an adulterous intercourse, cannot inherit from Lilá Bhárthi.

The Assistant Judge has found that the plaintiff was not initiated as a '*chelá*' or disciple of Lilá Bhárthi: so on this ground also the plaintiff fails.

We cannot—in this suit, which concerns only one portion of Lilá Bhárthi's property, and to which all persons in possession of the rest of his property are not parties—decide whether, or to what extent, the plaintiff is entitled to maintenance.

We affirm the decree of the Assistant Judge with costs.

Decree affirmed.

(1) I. L. R., 1 Bom., 97. (2) 2 Bom. H. C. Rep., 117.

[APPELLATE CRIMINAL JURISDICTION.]

Before Mr. Justice West and Mr. Justice Pinhey.

1877
August 1.

IMPERATRIX *v.* BABAN KHAN VALAD MHASKOJI.*

The Indian Penal Code (Act XLV of 1860), Section 217—Charge—Vagueness in charge.

The accused was charged under Section 217 of the Indian Penal Code; but the charge did not distinctly state what the direction of the law was, which he disobeyed, and how he disobeyed it.

Held, that when accused has been convicted on a charge expressed in vague terms, the prosecution on appeal should be limited to the particular sense in which the charge has been understood at the trial.

THE accused was convicted by M. H. Scott, Esq., Acting Sessions Judge of Satárá, under Sections 217 and 213 of the Indian Penal Code, and sentenced for the former offence to one year's rigorous imprisonment, and for the latter offence to two years' rigorous imprisonment and a fine of Rs. 50, in default to three months' further imprisonment of the like nature.

The charge under Section 217 ran as follows:—

"In that the accused, on or about the 25th day of October 1876, at the village of Shambhuked, taluka Mán, district Satárá, being a public servant—head constable—knowingly disobeyed the direction of the law as to the way in which he had to conduct himself as such public servant, with respect to the property found in an investigation held in a case of theft, with house-breaking, committed in the house of one Náráyanbhat bin Bajibhat, intending thereby to save, or knowing it to be likely that he would thereby save, Pandu valad Náná and several others from legal punishment."

At the trial of the accused, on this charge, the Judge framed the following issue:—

"Did accused cause any of the stolen property to be returned to the owner with intent to save certain persons from punishment?"

From the evidence of several witnesses, adduced on this point, it appeared that property alleged to be stolen from Náráyan-

* Appeal No. 176 of 1877.

bhat's house was found in the presence of the accused, and that it was taken to Náráyanbhat by the accused's orders. Náráyanbhat himself deposed that the accused told him that it would be better for him not to move further in the matter, lest he should incur the enmity of the villagers. The accused, in his defence, denied all knowledge of the matter, and endeavoured to prove that he only heard of the theft casually; that as soon as he heard of it he made enquiries, but could obtain no material information; and that, therefore, he made a report to that effect to his official superior.

After weighing the evidence produced on both sides on this charge, the Sessions Judge found the accused guilty. He also found him guilty on the charge of receiving a gift to screen offenders.

Macpherson (with him *V. N. Mandlik*), for the appellant, argued on the evidence to show that the Judge had not properly appreciated it.

[WEST, J.:—We are satisfied on the evidence that the accused has been rightly convicted on the charge as to receiving a gift. We shall not, therefore, call on the Government Pleader to address us on evidence. But with regard to the first charge, it seems to us that it is vague, and does not give the accused the information which the law intends should be furnished to him in order to enable him to rebut the precise accusation intended. We should like to hear the Government Pleader on this point.]

Nánábhái Haridás, Government Pleader:—I am not aware of any circular or rule forbidding a policeman from returning property seized by him on suspicion of a cognizable offence; but the accused himself was asked, at his trial, whether there was any authority to return such, and he admitted that there was none. The Code of Criminal Procedure, in Section 92, directs a police officer to arrest any person found with property reasonably suspected to be stolen; and by Section 415 makes it obligatory on him to report the seizure of such property to a Magistrate. The accused asserts that he made this report, but he is found not to have done so; and in this consists the disobedience of a direction of the law. Section 114 also requires an officer in charge of a police-station

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to send intimation of the suspected commission of a cognizable offence to a Magistrate having jurisdiction. Then Section 21 of the District Police Act (Bombay Act VII of 1867) says it shall be the duty of every police officer to prevent the commission of offences, and to detect and bring offenders to justice. The conduct of the accused in returning stolen property to its owner without making a report was in disobedience of the law as laid down both in the Code of Criminal Procedure and the District Police Act. At any rate, there has not been in this case a failure of justice or such a prejudice to the accused in his defence as would justify a reversal of his conviction under Section 283 of the Code of Criminal Procedure.

The judgment of the Court was delivered by

WEST, J.:—We think that the first head of the charge in this case did not give to the accused the information which the law intended him to have of the particular offence, expressed circumstantially, to which he was called upon to answer. The descriptions of crimes in the Penal Code must of necessity be expressed in abstract terms, but the very object of a trial is to determine whether particular acts or omissions on the part of an accused fall or do not fall within the rule thus abstractedly stated. Conformably to this principle, all the models of charges in Schedule III to the Code of Criminal Procedure contain or imply the setting forth with reasonable particularity of the matters alleged to constitute the offence. Here the accused was charged that he "being a public servant* * * knowingly disobeyed the discetion of the law as to the way in which he had to conduct himself as such public servant with respect to the property found in an investigation held in a case of theft, &c.;" what the direction was, and what the conduct was, which contravened it, the accused is not informed. He may very well have been prejudiced in his defence by this omission, for we, having carefully perused the proceedings, understood that the gist of the charge was that the accused, a head constable, had allowed stolen property to be returned to the owner in order to hush up the offence; while the Government Prosecutor now insists that it consisted in the omission of the accused to make a report, under Section 415 of

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the Code of Criminal Procedure, of his having seized the property. We cannot find that, in fact, he had seized it. It appears rather that when it was found he allowed it to be restored to the owner instead of seizing it. That this was a disobedience of a direction of the law—what the direction is, and where it is set forth, has not been shown, as perhaps it might have been, in either court, and on this very account, it would seem, it is now contended that the conduct consisted in not sending a report. But the least that can fairly be allowed in favour of one criminally convicted is, that when a charge has been expressed in vague terms, the prosecution should be limited to the particular sense in which these terms have been understood in the actual trial. The mere circumstance that evidence was given about the omission to send a report in order to afford a collateral corroboration to the testimony going to prove a criminal breach of duty of another kind, did not, and does not, make the accused liable to punishment for the offence thus incidentally deposed to, but with which he was not clearly and directly charged.

We, therefore, reverse the conviction and sentence on the first head of the charge, confirming those on the second head.

Conviction and sentence on first head reversed, on second affirmed.

[APPELLATE CIVIL JURISDICTION.]

August 14.

Before Sir M. R. Westropp, Knt., Chief Justice, and Mr. Justice West.

NÁRÁYAN MÁDHAVRÁO NÁIK AND ANOTHER (PLAINTIFFS AND APPELLANTS) *v.* THE COLLECTOR OF THÁNÁ (DEFENDANT AND RESPONDENT).*

Section 12, Clauses I. and II., Schedule III., Act VII. of 1870, Section 6, Clause IV., Articles (c) and (d) and Clause IX.—Act VIII. of 1859, Sections 29, 31, and 36—Suit for setting aside a mortgage-deed and injunction against the mortgagee—Valuation.

There is no appeal against the order of a District Judge fixing the amount of the court fee chargeable on a plaint.

* Regular Appeal No. 28 of 1877.

1877.

NÁRÁYAN MÁDHAVRÁO NÁIK AND ANOTHER v. THE COLLECTOR OF THÁNÁ.

The right of appeal to which the plaintiff might have been entitled under sections 31 to 36 of Act VIII. of 1859 has been taken away by section 12, clause 1 of the Court Fees Act VII. of 1870.*

THIS was a regular appeal from the decision of W. Wedderburn, Acting District Judge at Thánáá.

Náráyan Mádhavráo instituted this suit against the Collector of Thánáá, and alleged that the defendant had attached the plaintiff's property on account of arrears alleged to be due to Government on certain liquor and other contracts; that during the attachment plaintiff was compelled by the defendant to execute a mortgage-deed (Exhibit No. 10), and that as the deed was obtained by coercion, plaintiff prayed for a decree, declaring the deed cancelled, and for an order to the Collector not to attach and sell the property mentioned in it. The plaint was written on a stamp of Rs. 10. The defendant took a preliminary objection that the plaint was not properly stamped as required by Act VII. of 1870, Schedule I. The District Judge ruled that the stamp duty payable was Rs. 775, and, as the plaintiff declined to pay the additional stamp, rejected the suit.

Máhádev Chimnáji Apte appeared for the appellants.

Nánabhái Haridás, Government Pleader, appeared for the respondent.

The arguments of the pleaders on both sides are stated in the judgment of the court, delivered by

WESTROPP, C.J.:—This court is of opinion that any right of appeal, to which the plaintiff might have been entitled under sections 31 and 36 (combined) of the Civil Procedure Code (Act VIII. of 1859), against the order of the District Judge, which fixed the amount of the court fee chargeable on the plaint, has been taken away by section 12, clause I. of the Court Fees Act VII. of 1870. Under clause II. of the same section, a court of appeal, before which a suit may come, is, if the question of amount of fee have been wrongly decided in the court below to the detriment of the revenue, empowered to require payment of the additional fee, but has no authority to reduce the fee, if wrongly decided to the detriment of the subject and advantage of the

* *See*, however, *Gunga Monee Chowdhrani* v. *Gopal Chunder Roy*, 19 W. R. 214.

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revenue. Section 36 of the Civil Procedure Code is not mentioned in the second section or third schedule of the Court Fees Act amongst the enactments wholly or partially repealed by that Act; but section 2 and schedule III. are not exhaustive, and where a later Act is absolutely repugnant, in one of its provisions, to a provision in a former Act, the earlier enactment is *pro tanto* repealed. Here, accordingly, the special provision in section 12, clause I. of the Court Fees Act VII of 1870, being that the decision of the court, in which the plaint is filed, shall be final as to the amount of fee chargeable on the plaint, the 36th section of the Civil Procedure Code, which gives a general right of appeal on the rejection of a plaint on any of the grounds mentioned in sections 29 and 31 of that Code, is repealed, so far as regards the rejection of a plaint, on the ground that it has not been sufficiently stamped in respect of the court fee chargeable on it.[1]

We thus are relieved from the necessity of deciding the very difficult question as to the fee properly chargeable in such a case as the present, viz., what provision of the Court Fees Act regulates the fee chargeable on a plaint filed by a mortgagor, seeking to set aside a mortgage alleged to have been obtained by duress or force on the part of the mortgagee, and for an injunction against any exercise, by the latter, of a power of sale contained in the mortgage. It has been argued for the mortgagor that it comes within section 6, clause IV., pl. (*c*) and pl. (*d*); whereas, on behalf of the mortgagee, the Collector of Thánáá, it has been contended that it falls within clause IX. of the same section. The difficulty is one from which it would be desirable that courts of first instance should be relieved by a more explicit declaration of the intention of the Legislature.

The appeal, accordingly, is rejected with costs, to be paid by the appellants to the respondent.

Appeal dismissed.

(1) *See* 11 Beng. L. R. 370 and Civ. Ref. 14 of 1871 (Bombay), decided 29th August 1871, not reported.

[ORIGINAL CIVIL.]

Before Sir M. R. Westropp, Knt., Chief Justice, Sir Charles Sargent, Knt., Justice, Mr. Justice Bayley, Mr. Justice Green, and Mr. Justice West.

IN THE MATTER OF THE PETITION OF RATANSI KALIANJI AND SIX OTHERS.

1877. October 13.

Act VIII. of 1859, *Sections* 273 *to* 281—*Act X. of* 1872, *Sections* 3 *and* 223 *to* 343—*Act I. of* 1868, *Section* 6—*Construction—Procedure—Retrospective enactment—Judgment-creditor—Judgment-debtor—Decree—Execution—Imprisonment for debt—Discharge from arrest.*

Held, by a majority of the full Bench, (Sargent and Bayley, JJ., dissenting,) that a judgment-debtor, imprisoned in satisfaction of the decree against him under Act VIII. of 1859, is not entitled, under Act X. of 1877, to be released on the coming into operation of the latter Act, if he have then been imprisoned for more than six months but less than two years.

Per WESTROPP, C. J.—The judgment-creditor has, under Act VIII. of 1859, the right (subject to be divested only under the circumstances stated) to have such judgment-debtor as the above detained in custody for two years, unless he in the meantime fully satisfy the decree. Chapter XIX. of Act X. of 1877, subdivision I., is essentially prospective throughout. Section 342 must, therefore, be construed as relating only to future imprisonment, consequent on arrests to be made under Act X. of 1877. There is not in Chapter XIX. of that Act any trace of an intention on the part of the Legislature to deal with imprisonment commenced before the coming into force of the Act. Notwithstanding the repeal of Act VIII. of 1859 by Act X. of 1877, Act I. of 1868, section 6, saves the committal under Act VIII. of 1859, while that Act was in force, of a judgment-debtor, and also his consequent detention commenced before the coming into force of Act X. of 1877, if such detention is to be regarded as "procedure." The effect of Act I. of 1868, section 6, and Act X. of 1877, section 3, taken in combination, is to remove from the scope of the latter Act all proceedings after decree initiated before its coming into force, and then still pending, and to leave within its range all proceedings after decree initiated after its coming into force, though the suit and decrees, in and under which such last-mentioned proceedings may be taken were commenced and made before Act X. of 1877 came into force. Therefore, assuming the rule as to the retroactive force of enactments relating to procedure laid down in *Wright* v. *Hale* (6 H. & N. 227) to apply, still section 342 of Act X. of 1877 is not retrospective. But the question raised by the present application being one not merely of procedure, but of the divestment of the existing right of the judgment-creditor, the presumption is, (in the absence of express legislation, or direct implication to the contrary,) against giving retroactive force to section 342 of Act X. of 1877. The cases relating to questions of mere procedure, whereby a retroactive force has been given to enactments, reviewed, and distinguished from those by which no such force was given, by reason of their raising questions which affected vested rights

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Per SARGENT, J.—Sections 1 and 3 of Act X. of 1877, taken in connexion with Act I. of 1868, section 6, show that, whilst saving all acts already done in execution of a decree in a suit instituted before Act X. of 1877 came into force, all matters of procedure in execution subsequent to that date should be determined by the Act itself. The question raised by the present application is one of procedure, for the conditions and period under and for which the writ of imprisonment remains in force are as much matters relating to procedure as the issuing of the writ. Neither the wording of section 342 or the heading to Chapter XIX. of Act X. of 1877 necessarily confines the "imprisonment," therein referred to, to imprisonment commenced since that Act came into force. Though the judgment-creditor, by the arrest and imprisonment of his debtor, acquires a right different from the mere right of a plaintiff to have his cause of action tried according to a certain procedure, yet the rule that an Act is not to be construed retrospectively so as to defeat an existing right, is only a rule of construction, and must yield to the intention of the Legislature. It is difficult to suppose that the Legislature, when introducing a benign change into the law of debtor and creditor, in harmony with modern legislation, could have intended that two laws should continue for the next two years to operate concurrently, and that debtors imprisoned on the day before the latter Act came into force should be liable to be detained under the severer enactment.

Per BAYLEY, J.—Cases on the construction of statutes relating to procedure reviewed. History of imprisonment for debt before recent legislation in England, and before the abolition of the Supreme Court in Bombay. The change effected by Act VIII. of 1859 in the relative positions of debtor and creditor pointed out. *Coombe* v. *Caw* (13 Beng. L. R. 268) is inconsistent with the inviolable right claimed by the judgment-creditor to detain the judgment-debtor for two years. The sections of Act VIII. of 1859, relating to imprisonment for debt and its duration, are concerned with procedure alone. The definitions of "decree" and "judgment-debtor" in Act X. of 1877 are wide enough to include decrees passed, and judgment-debtors who have become such, before the coming into force of the Act. Sections 341 and 342 of Act X. of 1877 are applicable to proceedings pending when the Act came into force. The Legislature intended that the improvements introduced by the new Code should apply to suits brought under the old Code in those cases in which, consistently with the provisions of the new Code, they might, upon the ordinary principles of the interpretation of statutes, be clearly applicable. Section 3 of Act X. of 1877 implies that the procedure after decree shall be according to the provisions of that Act. *Sumboochundar Haldar* (1 Bourke 69) and *Williams* v. *Smith* (4 H. & N. 559) distinguished. Section 6 of Act I. of 1868 does not apply in the present case. When of two possible constructions, one is in strict harmony with the improvements introduced by the Act, and with the spirit of modern legialation, while the other treats the point under consideration as not having been considered by the Legislature at all, the former is to be preferred.

Per GREEN, J.—Apart from section 1, and the proviso to section 3, there is not, in Act X. of 1877, any provision as to its operation with regard to pending or past proceedings. Section 1 does not alter or abridge the legal effect, after 1st October 1877, of proceedings had and completed before that date; and in construing section 3 regard must be had to Act I. of

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1868, section 6, though the general rule of construction contained in the last-mentioned section must yield to the intention of the Legislature expressed in any subsequent Act. The proviso to section 3, coupled with section 1 of Act X. of 1877, shows that the intention of the Legislature was that the repeal of the old Procedure Acts was to affect, to some extent, the procedure, other than that prior to decree, in suits instituted before Act X. of 1877 came into force. Ample effect would be given to this intention, while regard would still be had to section 6 of Act I. of 1868, by holding that in all steps and proceedings, not prior to decree, had and taken after the 1st October 1877 in suits instituted before 1st October 1877, the provisions of the new Code are to be operative. Cases giving a retroactive force to enactments relating only to procedure reviewed and distinguished. The right of an execution-creditor to detain his debtor till satisfaction of the decree for a period not exceeding two years, under a warrant issued before 1st October 1877 by virtue of Act VIII. of 1859, is in no wise affected by the new Code coming into operation.

Per WEST, J.—Cases on the retroactivity of enactments reviewed. Act VIII. of 1859 must have clothed the Court's orders with an abiding validity, and the judgment-creditors with an abiding right, or else with none at all. The ministerial officer is to act on the order of the Court according to its original purport. The order, in the absence of an express provision to the contrary, retains its validity, until it is withdrawn or varied. The new procedure, therefore, does not apply, whether as touching person or property, except, perhaps, in matters of mere administration or provisional arrangement. It cannot, at any rate, apply so as to deprive the creditor of his right once acquired by the arrest of his judgment-debtor in execution. Any change in the relations of the parties can be made only in accordance with the later and existing law, but their previously subsisting relations continue to subsist as before. It is unlikely that the Legislature intended section 342 of Act X. of 1877 to apply to cases of imprisonment other than those arising under that Act. Section 342 is simply a negative provision, and the affirmative provisions with which it is to be read are to be found in the same chapter of the Act, and these can only be applied to cases arising after the Act has come into force. The close of the litigious transaction, like that of a contractual one, fixes the rights of the parties according to the then existing law, and in principle there is no distinction between a construction prejudicial to the debtor and a construction prejudicial to the creditor. The imprisonment under Act VIII. of 1859, as a "proceeding commenced," comes within the scope of section 6 of Act I. of 1868. Act VIII. of 1959, therefore, and not Act X. of 1877, governs the enforcement of the judgment-creditor's decree throughout the proceedings consequent on his application for the debtor's imprisonment under the former Act. If the present application for discharge be a proceeding commenced since the new Act came into force, it is not integral with the previous proceedings in execution. If, on the other hand, it is integral with them, it is part of a proceeding commenced before the new Act came into force. In neither case can it bring within the new Act orders deriving their validity from another law.

RATANSI KALIANJI and six other persons, all of whom were debtors confined under the provisions of Act VIII. of 1859, on the Civil Side

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of the Common Gaol in Bombay, in execution of separate decrees passed against them, respectively, in different suits for amounts in each case exceeding Rs. 500, joined in a petition to the Chief Justice and Judges of Her Majesty's High Court of Judicature at Bombay, praying that the petitioners might be discharged, on the ground that they had all been in custody for upwards of six months, though less than two years, on the 1st October 1877, the date of the coming into force of the new Code of Civil Procedure, Act X. of 1877. The petition was presented to Mr. Justice Green, the sitting Judge in Chambers, who directed notice of it to be given to the respective judgment-creditors. This was accordingly done ; but of the judgment-creditors only Trikamdás Shivrám and others, his co-plaintiffs in suit No. 212 of 1876, in which the petitioner Ratansi Kaliánji was a defendant, appeared to oppose the prayer of the petition.

Considering the importance of the question involved, viz., whether judgment-debtors, imprisoned under Act VIII. of 1859, who, on the coming into force of Act X. of 1877, had been in custody under civil process towards satisfaction of their judgment-debts for a period of six months or upwards, then became entiled, under sections 3 and 342 of the latter Act, to be discharged, the Chief Justice convened a full Bench of five Judges to hear it argued.

Their Lordships, though of opinion that the petition was unsustainable in form, seeing that there was not any unity of interest amongst the petitioners, except their detention under final process, and that, strictly speaking, each should have made a separate application for his discharge in the suit in which the decree in satisfaction of which he was detained had been made, yet deemed it advisable to consider the joint application on its merits, irrespectively of its infirmity in form.

Macpherson appeared on behalf of the petitioners to move the prayer of the petition.

Inverarity, for the plaintiffs in suit No. 212 of 1876, appeared to oppose the discharge of the petitioner Ratansi Kaliánji only. The question raised by the petition was, therefore, argued in reference only to the application of Ratansi Kaliánji ; but it was under-

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stood that the decision would be binding on the other petitioners also.

Macpherson, for the petitioners :—Act VIII. of 1859, section 276, declares what it is necessary for the judgment-creditor to do after the judgment-debtor has been committed to prison in execution of the decree. Act X. of 1877, section 3, cl. 3, saves only the procedure prior to decree in suits instituted before 1st October 1877. The general principle in the construction of statutes is that no retrospective force is to be given to them so far as they affect existing rights, unless the language of the enactment shows that to have been the intention of the Legislature : *Moon* v. *Durden*. (1) But there is an exception in the case of statutes which deal only with procedure, and these have been construed so as to affect pending proceedings which had been commenced under prior enactments : *Kimbray* v. *Draper*, (2) *Ex parte Anderson*. (3)

[WESTROPP, C. J. :—How is this a question of procedure ? There is no fresh proceeding necessary to detain the prisoners after they have been once committed to prison.]

The period during which the prisoners are detained is a part of the procedure ; so are the payments which have from time to time to be made by the execution-creditors in order that the prisoners may be detained. The warrant, under which the prisoners are committed to prison, orders their detention "till the further order of the Court," and a fresh proceeding is necessary for their liberation. The coercive power exercised by the Court on the prisoners is a part of the execution of the decree, and continues from day to day till the liberation of the prisoners when the decree is satisfied, or they have been detained for the full period allowed by the Act, or the detaining creditors fail to pay the subsistence money.

[WESTROPP, C.J. :—The creditor has, under Act VIII. of 1859, an existing right to detain his debtor till payment of the debt or the expiration of two years. To shorten that period would be to give Act X. of 1877 a retrospective force affecting this existing right.]

(1) 2 Ex. 22. (2) L. R. 3 Q. B. 160.
(3) L. R. 5 Ch. Ap. 473.

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The right to enforce a cause of action is not such a right as, under the rule of construction first cited, must be preserved in spite of a subsequent enactment, for the enforcement of a cause of action is merely procedure. The procedure continues till the decree is satisfied or the prisoner discharged. The creditor's right to imprison his debtor is only a means of enforcing the decree, and, therefore, is a part of the procedure : *Wright* v. *Hale*. (1)

[SARGENT, J., referred to *Attorney General* v. *Sillem*. (2)

BAYLEY, J., referred to *Framji Bomanji* v. *Hormasji Barjorji*. (3)

WESTROPP, C. J., referred to *Williams* v. *Smith*. (4)

There is a distinction between seizure of goods and imprisonment of the person, for the former is an actual satisfaction of the decree : *Kimbray* v. *Draper*, (5) *Freeman* v. *Moyes*. (6)

[WESTROPP, C. J., referred to 32 and 33 Vic., c. 62.

BAYLEY, J., referred to *Pardo* v. *Bingham*. (7)]

Act X. of 1877, sections 341 and 342, provide that, on the expiration of six months from the date of his imprisonment, the judgment-debtor is to be at once discharged. The terms "judgment-debtor" and "decree" are defined in section 2. Section 3 shows that the term "decree" is not to be confined to decrees passed under Act X. of 1877, and section 340 applies to sums disbursed before the coming into force of this Act. Act I. of 1868, section 6, is wide enough in its terms to make it possible to argue that *Wright* v. *Hale*(8) should not apply in India; but the real object of the Legislature in enacting Act I. of 1868 was that it should apply only to those Acts which are not inconsistent with it, as Act X. of 1877 is. This Act, therefore, must be construed independently of Act I. of 1868. The term "procedure" does not necessarily imply the taking of any step by either party, and the procedure in a suit does not terminate till satisfaction of the decree.

(1) 30 L. J. Ex. 40; S. C. 6. H. & N 227.
(2) 33 L. J. Ex. 226 ; S. C. 10 H. L. 704.
(3) 3 Bom. H. C. Rep. 49 O. C. J.
(4) 28 L. J. Ex. 286., S. C. 4 H. & N. 559.
(5) L. R. 3. Q. B. 160 (6) 1 A. & E. 338.
(7) L. R. 4 Ch. Ap. 735. (8) 30 L. J. Ex. 40 ; S. C. 66 H. & N. 227.

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[WEST J., referred to *Reg.* v. *Vine* (1) and *Phillips* v. *Eyre.* (2)]

There is no right vested in the plaintiff within the meaning of those decisions which rule that no retrospective force is to be given to a later Act so as to affect a vested right existing under a prior enactment; even if there were, the sections relating to imprisonment being of a penal nature must be construed liberally, that is, in favour of the petitioners.

Inverarity for the respondents who opposed:—A retrospective operation is not to be given to this Act: Broom Leg. Max. 34, *Evans* v. *Williams.* (3) Its whole phraseology shows that the sections relating to execution apply only to future applications for execution to be made under this Act. The argument for the petitioner is, at best, only an inference drawn from section 3 of Act X. of 1877. At the passing of that Act the decree had already been made and the defendant imprisoned under the old Act. The plaintiff, therefore, then had the right to detain the defendant for two years, though that right was liable to be divested either by the defendant paying the judgment-debt, or by the plaintiff failing to pay the subsistence money. Of that right, subject to such liability, no one could deprive the plaintiff under the old Act, and it is nowhere expressly taken away by the new. The sections relating to imprisonment relate to imprisonment under the new Act and not under the old. This appears clearly from the wording of section 339. That section occurs in Chapter XIX., which is headed "Of the Execution of Decree." This whole chapter must be held to refer to future executions, and, therefore, section 342 which occurs in this chapter, must be held to refer to future imprisonments to be made under this Act. As to consulting the heading of the chapter to assist in the construction of a section, see *Marriage* v. *Eastern Counties Railway Company,* (4) *Reg.* v. *Krishna Parashram,* (5) and *Krishnapa Santu* v. *Panchapa Gurpadapa.* (6) When Act VIII. of 1859 first came into force, it was held that pending proceedings in execution already commenced were to be governed not by it but by the

(1) L. R. 10 Q. B. 195.
(2) L. R. 4 Q. B. 225.
(3) 2 Dr. & Sm. 324.
(4) 9 H. L. 32.
(5) 5 Bom. H. C. Rep. 69 Cr. Ca.
(6) 6 Bom. H. C. Rep. 258 A. C. J.

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former Acts. *Sumboochunder Haldar*,(1) which being a full Bench ruling, would seem to throw doubt on *In re Muddoosooden Dass*.(2) See also *Attorney General* v. *Sillem*.(3) Act I. of 1868, section 6, prevents the repeal of Act VIII. of 1859 by Act X. of 1877 from invalidating any act or proceedings previously done or commenced.

Macpherson, in reply :—Section 339 of the Act of 1877 may be anomalous with regard to debtors imprisoned under the Act of 1859, but it is equally so with regard to those imprisoned under the new Act, section 338. It does not follow that, because some sections of the new Act apply only to persons imprisoned under it, therefore no section can apply to those imprisoned under the old Act.

Cur adv. vult.

WESTROPP, C.J. :—On the 1st of May 1876 a warrant of arrest, under section 201 of the old Civil Procedure Code (Act VIII. of 1859), was issued against Ratansi Kaliánji pursuant to a Judge's order of the 29th April 1876, upon an application for execution of a decree of the 27th April 1876. Ratansi Kaliánji was arrested upon the 30th of October 1876, was brought before a judge in Chamber on the 31st October 1876, and then finally committed by the Judge, "until he (Ratansi Kaliánji) satisfy the amount of the decree passed against (him) the said Ratansi Kaliánji in the above suit." Then followed in the same order the usual direction, under section 278 of Act VIII. of 1859, that the plaintiffs should pay to him subsistence allowance at the rate of 4 annas *per diem*, by monthly payments in advance. The receipts indorsed on the Judge's order by Mr. Lake, for the superintendent of the gaol, and by the sheriff, and the certificate of the latter, show that the detention of the prisoner Ratansi Kaliánji commenced more than six months previously to the 1st October 1877, and has not yet reached two years. Similar receipts indorsed on the Judge's orders, under which the other six petitioners, namely, Gulabchand Nemchand, Soodershun Santookrám Premji Nandoo, Rustomji Jámásji, Motilál Kaliándás, and Ezekiel Solomon, have been finally committed in execution, show that they also have, respectively, been detained for more than six

(1) 1 Bourke 69. (2) 2 Hyde 215. (3) 10 H. L. 704.

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months and less than two years. Their judgment-creditors have not appeared; but as those creditors have not assented to the discharge of the six last-named petitioners, we must consider with respect to them, as well as with respect to Ratansi Kaliánji, whether they are, under the new Civil Procedure Code, entitled to be discharged from custody. As there is not, for the purpose of the present application, any substantial difference between their cases and that of Ratansi Kaliánji, it will be sufficient if in the following remarks I name him only.

When he was finally committed on the 31st October 1876, his judgment-creditors, the plaintiffs, had, on the condition of regularly paying the subsistence-money, then by the Judge, in the order of that date, directed to be paid, the right under section 278 of the old Code combined with section 201 of the same to have him detained in custody for two years, if he did not in the meantime fully satisfy the decree. Section 201 enacts that "if the decree be for money, it shall be enforced by the imprisonment of the party against whom the decree is made, or by the attachment and sale of his property, or by both, if necessary; and if such party be other than a defendant, the decree may be enforced against him in the same manner as a decree may be enforced against a defendant." Section 278 provides that "a defendant shall be released at any time on the decree being *fully satisfied*, or at the request of the person at whose instance he may have been imprisoned, or on such person omitting to pay the allowance, as above directed. No person shall be imprisoned on account of a decree for a longer period than two years, or for a longer period than six months, if the decree be for the payment of money not exceeding Rs. 500, or for a longer period than three months, if the decree be for the payment of money not exceeding Rs. 50. This right of detention was subject to the prisoner's right to apply for his discharge under the Imperial Statute (11 and 12 Vic., c. 21) for the relief of insolvent debtors in the Presidency towns in India, or, at his option, to such relief as he might obtain under sections 280 and 281 of the old Civil Procedure Code. It was not subject to the relief contemplated by sections 273 and 274 of that Code, and by section 8 of Act XXIII. of 1861, inasmuch as those sections are applicable only to the judgment

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debtor, when he is first arrested and brought before the Judge or Court, and not after the Judge has made his final order of committal. This is manifest upon reading those sections, and there is an express decision on the point with regard to the last of them (section 8 of Act XXIII. of 1861) by Mr. Justice Norman: *Smith* v. *Boggs*. (1)

There is nothing inconsistent with this in the case of *Coombe* v. *Caw* (2) which arose under section 273, when the debtor was first arrested under the decree and brought before the Judge previously to committal. In fact, Couch, C.J., there mentions section 280 as the section which should be resorted to after committal. The question as to the applicability of that section, when the debtor has resorted to the Insolvent Court, has been considered in Calcutta (3) by Phear, J., but need not be now discussed, inasmuch as neither Ratansi Kaliánji nor any of the other petitioners have sought relief under the Insolvent Debtors' Act, or under sections 280 and 281 of the old Civil Procedure Code. Hence, up to the coming in force of the new Code, the right of detention on the part of the judgment-creditors was in full force. The faint contention on behalf of Ratansi Kaliánji, that his present detention is of a penal nature, is wholly unsustainable. His imprisonment is purely civil, being a detention towards satisfaction of a judgment-debt. The original warrant of arrest directs his arrest so that he may be brought before the Court "to answer unto the plaintiffs for the sum of Rs. 11,995-13-8, being the amount of the said decree;" and the subsequent order of committal, signed by the Judge, runs thus: "I do order that the sheriff do detain the said Ratansi Kaliánji *until he satisfy the amount of the decree* passed against the said Ratansi Kaliánji in the above suit." The order of committal of the petitioner Ezekiel Solomon, signed by my brother Sargent, directs detention until satisfaction of the warrant of arrest. The warrants against all of the petitioners are in the same printed Court form as in the case of Ratansi Kaliánji, and mention the amount of each decree. The Judge's orders of committal slightly vary in form—some directing detention until satisfaction only, others until satisfaction or further order; others until payment (which would be satisfaction) or further order. Thus it will be

(1) 5 Beng. L. R. Appx. 21.
(2) 13 Beng. L. R. 268; S. C. 22 Calc. W. R. 257 Civ. Rul.
(3) 1 Ind. Jur. N. S. 247; 2 Ind. Jur. 91.

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seen that they all sound in satisfaction, and none in penalty. I treat the variations in form as of no importance. The question in all of the cases is one and the same, viz., whether by the operation of the new Code the judgment-creditors have been deprived of their right of detention of the judgment-debtors for two years from the respective dates of their committals by the Judge, subject to the qualifications which I have already stated. If we decide this question in the affirmative, we must give a retrospective effect to the 342nd section of the new Code.

On the subject of giving such a construction to statutes, Baron Rolfe (afterwards Lord Cranworth) in *Moon* v. *Durden*, (1) a leading case on that topic, said : "The general rule on this subject is stated by Lord Coke in the Second Institute 292 in his Commentary on the Statute of Gloucester : '*Nova constitutio futuris formam imponere debet non præteritis*;' and the principle is one of such obvious convenience and justice, that it must always be adhered to in the construction of statutes, unless where there is something on the face of the enactment putting it beyond doubt that the Legislature meant it to operate retrospectively." Baron Aldersen pointed out in that case the extensive and dangerous consequences that might follow if the Courts did not abide by that general rule, and Baron Parke (Lord Wensleydale) said that it "is deeply founded in good sense and strict justice, and has been acted upon in many cases." *Moon* v. *Durden* (2) has received the approbation of many Courts, also of H. M.'s Privy Council (*Doolubdass* v. *Ramloll* (3) and of the American Courts (1 Kent. Comm. 511, 10th ed.), and is now indisputable law.

While this is conceded on behalf of the plaintiffs, and that accordingly, as a *general* rule, a retroactive effect should not, in the absence of express language or necessary implication showing that the intention of the Legislature is otherwise, be given to statutes or Acts, it is contended that this rule is not *universal*, and is not only inapplicable to statutes or Acts regulating procedure, but that the presumption is that, *primâ facie*, enactments regulating procedure are intended to be retrospective.

(1) 2 Exch. 22; see p. 33. (2) 2 Exch. 22.

(3) 7 Moore P. C. 239; see p. 256.

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For the present, assuming that exception to the general rule against giving retroactivity to enactments to be true in its full breadth as thus propounded, I purpose to consider whether the new Civil Procedure Code, when taken in connexion with the General Clauses Act (I. of 1868), section 6, and also, (in order to avoid being misled by limiting the tests to a single rule), when subjected to the other recognized canons for the interpretation of statutes, is, as to the duration of civil imprisonment, retrospective, and entitles the petitioners to succeed in their application.

I have read with minute attention the whole of chapter XIX. of the new Code, extending from section 223 to section 343 (both inclusive), and with the single exception of the last clause in section 230, which is of a saving character, and has no bearing upon the present question, I find the language of that chapter to be purely prospective, *i.e.*, to deal with the future only, and not to touch any proceeding already taken in execution of decrees. Bearing in mind the rule as stated by Burton, J., in *Warburton* v. *Lowland d. Ivie*, (1) and commended by Parke, B., (2) and Jervis, C. J., (3) that in the construction of statutes, "in the first instance, the grammatical sense of the words is to be adhered to;—if that is contrary to, or inconsistent with, any expressed intention, or any declared purpose, of the statute; or if it would involve any absurdity, repugnance, or inconsistency in its different provisions, the grammatical sense must then be modified, extended or abridged so far as to avoid such an inconvenience, but no further," I proceed to consider the portion of that chapter which is especially material with respect to the present application. That portion is subdivision I., which treats "of arrest and imprisonment," and which commences with section 336 and ends with section 343. That subdivision appears to me to be essentially prospective throughout, and to refer to future arrest and future consequent imprisonment, and future discharge from the same arrest and same imprisonment, and no other. It preserves an unbroken silence with regard to imprisonment and discharge from the same, where such imprisonment was a continuing imprisonment at the time when the Act came into force. Section 336 commences thus:—"A judgment-

(1) 2 Hud. & Br. 648. (2) 1 M. & W. 264. (3) 15 C. B. 484

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debtor *may be* arrested in execution of a decree," &c. All of the provisoes in the subsequent clauses of that section also sound in the future. Section 337 runs thus :—"Every warrant for the arrest of the judgment-debtor *shall* direct the officer entrusted with its execution to bring him before the Court with all convenient speed," &c. Section 338 :—"The Local Government *may* from time to time prescribe scales, graduated according to rank, race, and nationality, of monthly allowances payable for the subsistence of judgment-debtors." Section 339 :—"No judgment-debtor *shall* be arrested in execution of a decree unless and until the decree-holder pays into Court" subsistence-money, &c. The subsequent clauses that in section all sound *in futuro*, ex. gr.: "The first payment *shall* be made for such portion of the current month as remains unexpired before the judgment-debtor is committed to jail." Section 340, further treating of subsistence-money, is also in the future. Section 341, to which we next come, is an important section, relating, as it does, to the circumstances under which the debtor may be discharged: "*The judgment-debtor* shall be discharged from jail, &c." "The judgment-debtor," here spoken of, appears to me, by all the usual rules of grammatical construction, to be the only judgment-debtor of whom the sub-chapter (Division I.) has theretofore treated, namely, a judgment-debtor arrested and committed to prison under the new Code. This section proceeds to state the circumstances under which the judgment-debtor shall be discharged, viz :—

"(*a*) on the decree being fully satisfied," or

"(*b*) at the request of the person on whose application he has been imprisoned," or

"(*c*) on such person omitting to pay the allowance as *hereinbefore* directed," or

"(*d*) if the judgment-debtor be declared an insolvent, as hereinafter (Chapter XX.) provided," or

"(*e*) when the term of his imprisonment, as limited by section 342, is fulfilled."

Here in clause (*e*) the Legislature, in using the phrase "his imprisonment," appears to me to speak of the imprisonment of no other judgment-debtor than of him of whom the whole of the

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preceding part of this section (341) and of the preceding part of sub-chapter I have been conversant, namely, a judgment-debtor arrested and committed in execution under the new Code. The two remaining provisions in section 341 are not material in the present question. Before discussing section 342, it is convenient to mention section 343, which closes the sub-chapter I on arrest and imprisonment. Section 343 is conversant only of future arrests, and enacts that "the officer entrusted with the execution of the warrant *shall* endorse thereupon the day on, and manner in, which it was executed," and provides for the return to be made to it in certain events, &c. Reverting, then, to section 342, upon which the petitioners ground their application, we find that it runs as follows :—"No person shall be imprisoned in execution of a decree for a longer period than six months ; or for a longer period than six weeks if the decree be for the payment of a sum of money not exceeding fifty rupees." Finding this section in a sub-chapter, the whole of the rest of which appears to treat of future arrest and the imprisonment consequent upon that future arrest, it seems to me to be the most natural construction of section 342 to hold that to such imprisonment only does it relate. It would be, I think, a forced construction to apply it to any other imprisonment. I have failed to discover any trace, in the rest of sub-chapter I or of the main chapter XIX, of which that sub-chapter forms a part, of any intention on the part of the Legislature to deal with imprisonment commenced before the new Code came into force. We have, however, been referred to section 3 in the first chapter of the new Code, which section repeals the enactments specified in the first schedule annexed to that Code ; amongst which enactments are the old Civil Procedure Code of 1859, and Act XXIII of 1861. The portion of section 3 of the new Code which is especially relied upon for the petitioners is the following proviso :—"Nothing herein contained shall affect the procedure prior to decree in any suit instituted or appeal presented before this Code comes into force," *i.e.*, before the 1st October 1877. It is argued for the petitioners that this saving of procedure, prior to decree in suits commenced before the new Code came into force, implies that all proceedings subsequent to decree in such suits (including proceedings which had been initiated before the 1st October 1877, and have been continued after that

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day, as well as proceedings initiated after that day) must be governed by the new Code, inasmuch as the old Code stood repealed by the new Code on the 1st October 1877. But, in seeking to arrive at the true construction of the new Code, we are bound to keep in view the provisions of the General Clauses Act I of 1868, of which the sixth section is of vital importance on the present question. It provides that "The repeal of any statute, Act, or regulation shall not affect *anything done*, or any offence committed, or any fine or penalty incurred, *or any proceedings commenced, before the repealing Act shall have come into operation.*" So far as that enactment preserves "anything done" previously to the repealing Act taking effect, it merely embodies the law as previously declared by eminent judges: for example, Lord Tenterden in *Surtees* v. *Ellison*[1] said:—"It has long been established, that, when an Act of Parliament is repealed, it must be considered (*except as to transactions past and closed*) as if it had never existed. That is the general rule; and we must not destroy that by indulging in conjectures as to the intention of the Legislature." That statement of the rule is adopted *in totidem verbis* by Lord Justice Turner in *Grisewood and Smith's case.*[2] The same clause in the General Clauses Act in preserving "proceedings commenced" before repealing Acts come into operation, seems to have been penned in the spirit of the doctrine laid down in 1837 by Lord Denman and his colleagues of the King's Bench in *Hitchcock* v. *Way*,[3] when they said that they were "of opinion in general that the law as it existed when the action was commenced must decide the rights of the parties in a suit, unless the Legislature expresses a clear intention to vary the relation of litigant parties to each other." The committal under the old Code, while yet in force, of a judgment-debtor by a Judge towards satisfaction of a decree against that debtor, being a *thing done* under that Code, is clearly within the language and meaning of, and saved by, the General Clauses Act, section 6, notwithstanding the repeal of the old Code under which that thing was done. And further, I think, if the continued detention of that judgment-debtor is to be regarded as procedure, that detention, having com-

(1) 9 B. & C. 750; see p. 752. (2) 4 De G. & J. 544; see p. 557.
(3) 6 A. & E. 943, 951.

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menced before the new Code, which repealed the old Code, came into force, is expressly saved by the General Clauses Act, and cannot be governed by the new Code. There would, indeed, be some weight in the argument that the express saving, in section 3 of the new Code, of procedure previous to decree, in suits commenced before the new Code came into operation, excluded by implication the operation of section 6 of the General Clauses Act as regards procedure after decree, which procedure had been commenced before the 1st October 1877 and was still pending at that date, if the new Code had made any provision for proceedings, after decree, commenced before the 1st October 1877 and then still pending. But the new Code has not made even the semblance of such a provision. For instance, that Code is completely silent as to the continuance of custody under arrests and committals (after decree) made before the new Code came into operation. If that continuance of custody be not sustained by the repealed Code taken in combination with the saving of things done and proceedings commenced, contained in section 6 of the General Clauses Act, such continuance of custody would be wholly without support. In illustration of the results of leaving out of view the General Clauses Act, I will take first the case of a debtor arrested by the sheriff late in the afternoon of the 30th of September 1877 under a warrant issued under section 201 of the old Code and when it is too late to bring him before the Judge sitting in Chamber to be dealt with under section 273 of that Code. After 12 o'clock that night his detention by the sheriff would become illegal, and he could not lawfully keep him in custody sufficiently long to bring him before the Judge at the opening of the Court on the following morning; and, even if he did so, inasmuch as section 336 of the new Code relates only to arrests made after the 1st October 1877 and to committals upon those arrests, the Judge could not commit the debtor to prison unless the old Code be, as regards proceedings (after decree) commenced before the 1st October 1877, kept alive by section 6 of the General Clauses Act. Take, again, the case of a debtor whose arrest by the sheriff and committal by the Judge were complete before the 1st October 1877. The committal having taken place on the 30th September, if the continuance of the custody under that committal be not supported by the old Code taken together with section 6 of the

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General Clauses Act, the debtor would have become entitled to his discharge on the 1st October 1877 after having spent but one night in prison.

These, in consequence of no provision having been made in the new Code as to the continuance of custody commenced before the 1st of October 1877 (section 336 of the new Code, which regulates arrest and committal, relating exclusively to future arrests and future committals following on such future arrests), would (on the theory that the detention under the arrest and the detention under the committal are, so long as they endure, to be deemed constantly continuous procedure on the part of the Court, which theory is contended for on behalf of the petitioners) be amongst the results of holding that the repeal of the old Code was complete as well with respect to proceedings (after decree) pending when the new Code came into operation, as with respect to proceedings (after decree) commenced subsequently to that event. The petitioners' counsel, however, felt himself compelled to admit that neither fresh warrants of arrest nor fresh orders of committal would be necessary in order to legalize the continuation, after the 1st October 1877, of the imprisonment of judgment-debtors, towards satisfaction of decrees exceeding Rs. 500, committed before the 1st of October 1877, and who had not been in prison for six months. Yet that continuation of imprisonment has nought save the committal made under the old Code to support it, which committal would cease to be operative for that purpose unless proceedings (after decree) commenced before the 1st of October 1877, but continuing beyond that day, are supported by the repealed Code combined with section 6 of the General Clauses Act. It has already been pointed out that the directions in the new Code as to the payment of subsistence allowance relate only to debtors arrested and committed under the new Code. Section 339, which alone regulates the order to be given by the Judge as to subsistence money, is dumb as to the continuance of the payment of it to debtors committed under the old Code; and sections 338 and 340, which also relate to that money, are equally silent as to such debtors. Section 341, cl. (*c*), lays down only what shall be the result of an omission to pay the allowance as *hereinbefore* directed, *i.e.*, previously directed in the new Code; which direction

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is contained in section 339, and is in respect of persons arrested under the new Code.

It seems to me impossible to account, in a manner respectful to the Legislature, for its silence in the new Code on these matters, except on the highly reasonable supposition that it deemed them to be sufficiently provided for by section 6 of the General Clauses Act, either as things done, or proceedings commenced before the new Code, which repealed the old Code, came into operation. This hypothesis is perfectly consistent with the existence of an ample field for the operation of section 3 of the new Code, removing, as such a supposition would, from the scope of that Code such proceedings (after decree) as had been initiated before and were pending when the new Code came into force, and leaving within its range all proceedings (after decree) initiated subsequently to its coming into force, even though the suits, in which such last-mentioned proceedings may be taken, are suits which were commenced and the decree itself was made before the new Code came into operation. Such an interpretation of section 3 of the new Code would be in complete harmony with the elementary rule, that construction is to be made of all the parts of a statute together, and not of one part only by itself,—a stringent principle of English law. It is given as the foremost rule by Lord Coke for arriving at "the most natural and genuine exposition of a statute," Co. Lit. 381 *a*; and in *Lincoln College Case* it was resolved by the Common Pleas "that the office of a good expositor of an Act of Parliament is to make construction on all the parts together, and not of one part only by itself; "*nemo enim aliquam partem recte intelligere possit, antequam totum iterum atque iterum perlegerit.*"(1) This canon of interpretation has been exemplified by numerous instances collected by Sir P. Benson Maxwell in his recent useful treatise on statutes, p. 25 *et seq.*, and has the advantage of being founded on the strongest common sense, and of an antiquity not less than the age of Justinian :—"*Incivile est, nisi tota lege perspecta, una aliqua particula ejus proposita, judicare vel respondere*," being the *dictum* of Celsus as laid down in the Digest Lib. I, Tit. iii, pl. 24. We thus treat section 342 as in the same sense with the other sections of the chapter and sub-chapter of

(1) 3 Rep. 59 *b*.

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the new Code amongst which we find it set. We apply to section 3 in the first chapter an interpretation which does not give to section 342 a complexion different from its surrounding context, yet which assigns to it an ample operation, without, by a forced and unnecessary implication, extending its scope to the extinction of proceedings commenced under the old Code and pending when the new Code came into force, for which proceedings the new Code has not provided any substitute, nay more, as to which it is absolutely voiceless. And, lastly, we respectfully regard the Legislature as keeping steadily within its view the law, which, considerately and justly, it has prescribed in the General Clauses Act for the interpretation of repealing enactments passed by itself, whereby proceedings, founded on costly decrees, and commenced before the repealing statute becomes law—proceedings themselves the products of further expense to the creditor—are saved from becoming nugatory when the Legislature repeals the laws under which they were instituted. The Legislature is thus shielded from the imputation of a hasty and capricious alteration of the law without regard to the interests of those who have, in pursuance and on the faith of that law, been with all due diligence seeking the enforcement of their just rights, as already ascertained by judicial determination, and who had, as in the present instance, perfected those proceedings, and whose consequent right of detention of their defaulting debtors was in course of actual fulfilment. It may be said that we ought to promote the development of the latest policy of the Legislature, in diminution of civil imprisonment, as indicated in section 342 of the new Code, because it is a humane and indulgent policy. It is our undoubted duty loyally to carry into effect the intentions of the Legislature. But where those intentions, as disclosed in the Code itself, wear an aspect purely prospective; were we, in advancement of a supposed policy, to give to them a retroactive effect, we should travel beyond our powers, and, instead of limiting ourselves to the duty of expositors and administrators of the law, should usurp the office of supplementary legislators. Again, our consciences are equally bound to notice as well the earlier, while yet in force, as the later ordinances of the Legislature, and so to administer both, where they may consistently stand together, as to give to each a full and fair operation, without undue curtailment of the intended effect of

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either. If their respective provisions admit of reconcilement with each other, it is, I venture to think, our bounden duty so to reconcile them. Should the Courts, departing from rules of exposition, venerable by time and justified by experience, in the pursuit of the phantom of some possible, but unexpressed and unindicated, policy of the Legislature, yield themselves up to the guidance of simple conjecture, there cannot be much safety in their construction of written law. In recapitulation, then, I would say that, to me it appears that the location of section 342 in the context of a chapter and sub-chapter purely prospective,—the absence of any provision in the new Code in respect of the continuance of imprisonment, whose inception was before the new Code came into force,—the facility of reconciling its third section with the 6th section of the General Clauses Act, which protects things done and proceedings commenced under repealed Acts, and thus directly controls the provision in the new Code whereby the old Code is repealed,—are circumstances which, taken together, completely repel and exclude the application to section 342 of the new Code of the alleged rule that *primâ facie* all Acts regulating procedure should be presumed to be retrospective.

It appears also to be improbable that the Indian Legislature would, by such a side wind as the petitioners seek to raise out of section 3 of the new Code, have sought to effect the intention which those petitioners attribute to that Legislature. When the Imperial Legislature in 1869 was abolishing thenceforward imprisonment for debt in England, and resolved also on dealing with persons in custody at the passing of the statute for thus altering the law (32 and 33 Vic., chap. 62), it did not leave this latter intention to any slender or imperceptible inference, but provided by the seventh section of that statute in express terms for the discharge of such persons. There is not any reason for supposing that the Indian Legislature would, if its policy were the same, be less candid and bold in its avowal.

So far I have discussed the enactments bearing upon this case on the assumption that the usual presumption against a retrospective construction of statutes and legislative Acts is not applicable to it. And I have, independently of the aid of any such

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presumption, and upon the hypothesis that the presumption is *primâ facie* the other way, arrived at the conclusion that section 342 of the new Code is not retrospective. I am, however, further of opinion, that were it necessary to resort to the usual presumption against a retrospective interpretation, we might legitimately and in conformity with the preponderance of authority call it in aid in this case. In support of the proposition that the rule against a retrospective construction, unless the language be express or the implication be so direct that without such an interpretation the thus manifested intention of the Legislature would be frustrated, is not applicable to enactments regulating procedure, *Wright* v. *Hale*[1] has been cited. It arose upon the Stat. 23 and 24 Vic., c. 126, sec. 34, which provides that when the plaintiff in any action for an alleged wrong recovers by the verdict of a jury less than £5, he shall not be entitled to any costs, if the Judge certifies to deprive him of them, and enables a Judge so to certify in an action commenced before, but tried after, the passing of that Act. Pollock, C.B., said :—"There is a considerable difference between new enactments which affect vested rights and those which merely affect the procedure in Courts of justice, such as those relating to the service of proceedings, or what evidence must be produced to prove particular facts." After referring to such matters as mere regulations of practice, he continued thus :—"Rules as to costs, to be awarded in an action, are of that description, and are not matters in which there can be vested rights. When an Act alters the proceedings which are to prevail in the administration of justice, and there is no provision that it shall ot apply to suits then pending, I think it does apply to such actions. Here the plaintiff had an opportunity of discontinuing his suit, &c." Speaking of the certificate, he said :—"That is an act to be done at the trial which was after the passing of the Act. I think, then, that we are not giving to the Act any retrospective operation, and the wrong supposed to be done by an *ex post facto* law does not arise." Barons Channell and Wilde based their judgments on the distinction between enactments dealing with procedure and those dealing with rights. And it should be noted that *Williams* v. *Smith*,[2] a decision of the

(1) 6 H. & N. 227 ; S. C. 30 L. J. N. S. Exch. 40 ; 6 Jur. N. S. 1212.
(2) 4 H. & N. 659 ; S. C. 28 L. J. Ex. 286.

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same Court (the Exchequer), and to which I shall presently again advert, was cited to the Court by Mr. Montague Chambers; and of it, and of *Jackson* v. *Woolley*,(1) and other cases also cited by him, Baron Wilde (now Lord Penzance) said:—"The cases cited by Mr. Chambers are cases relating to rights, which were not affected; those referred to by Mr. Hawkins were cases relating to procedure:" so it is very evident that Baron Wilde had no intention of denying the authority of *Williams* v. *Smith*;(2) and even if he and the Judges of the Exchequer, in 1860, when *Wright* v. *Hale*(3) was decided, had been disposed to overrule *Williams* v. *Smith*,(4) they had not authority so to do, as the decision in *Williams* v. *Smith*(5) of their own Court, the Exchequer, in 1857, had been affirmed by a superior tribunal—the Exchequer chamber—in 1859. It is also to be noted that in *Wright* v. *Hale*,(6) which is always cited as the authority for giving a retrospective operation to Acts relating to procedure, Chief Baron Pollock justified his decision by saying that he was not giving a retrospective operation to the statute, because the certifying for costs was an act to be done at the trial, *which did not take place until after the statute came into force*. In the *Attorney General* v. *Sillem*,(7) *Wright* v. *Hale*(8) was approved by Lord Wensleydale, who, however, was careful to say that the decision there did not take away any right, but was disapproved by Lord Cranworth, who said:—"The authorities show that when new arrangements come into force for regulating procedure, they operate on pending as well as future suits. Where this principle has been acted on with reference to costs I cannot quite reconcile my mind to what has been done." The latest English case in which *Wright* v. *Hale*(9) has been followed is *Kimbray* v. *Draper*.(10) It is manifest, however, that the Queen's Bench thought that the Exchequer in deciding *Wright* v. *Hale*(11) had carried the principle there laid down to the utmost verge

(1) 8 E. & B. 784.
(2) 4 H. & N. 559; S. C. 28 L. J. Ex. 286.
(3) 6 H. & N. 227; S. C. 30 L. J. N. S. Ex. 40; 6 Jur. N. S. 1212.
(4) 4 H. & N. 559; S. C. 28 L. J. Ex. 286.
(5) *Ibid.*
(6) 6 H. & N. 227; S. C. 30 L. J. N. S. Ex. 40; 6 Jur. N. S. 1212.
(7) 10 H. L. 704, 738, 763, 764; S. C. 33 L. J. Ex. 209, 218, 227.
(8) 6 H. & N. 227; S. C. 30 L. J. N. S. Ex. 40; 6 Jur. N. S. 1212.
(9) 6 H. & N. 227.
(10) L. R. 3 Q. B. 160.
(11) 6 H. & N. 227; S. C. 30 L. J. N. S. Ex. 40; 6 Jur. N. S. 1212.

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that it could be carried with safety. Cockburn, C.J., intimated that he should have had great doubts as to holding the statute, the subject of decision in *Wright* v. *Hale* [1] to be retrospective; and Blackburn, J., after stating the principle upon which it was decided, said :—"Whether the Court of Exchequer applied that test properly in holding it was matter of procedure where a statute enabled a Judge to deprive a plaintiff of costs in a case where but for the statute he would have been absolutely entitled to them, may be questionable; but for the decision in that case I certainly should have been inclined to think this was taking away a right." And then he proceeded to congratulate himself on the case before the Queen's Bench not being so strong an application of the principle as *Wright* v. *Hale*,[2] by adding: "The present case, however, is far more clearly matter of procedure, as the statute only imposes on the plaintiff the alternative of giving security for costs or proceeding in the County Court. That is certainly much more mere matter of procedure than was the case in *Wright* v. *Hale*,[3] and we are bound by the principle of that case." In *Kimbray* v. *Draper*,[4] Lush and Mellor, JJ., arrived with doubt at their conclusion.

Assuming, however, as I think we must, that *Wright* v. *Hale*[5] is law in England, it is evident from *Kimbray* v. *Draper*[6] that the principle laid down in the Exchequer in *Wright* v. *Hale*[7] will not be extended any further. To apply that principle to this case would be to extend it very much further. In *Wright* v. *Hale*,[8] although the action had been commenced before the statute, the trial took place after the statute; the right of the plaintiff there to costs when the statute was passed was only inchoate. Until he obtained a verdict for damages (which occurred after the passing of the statute), it was uncertain whether or not there might be a verdict with costs for the defendant, and his right, therefore, had not vested when the statute passed and was then merely contingent. If, then, the Judges of the Court of Queen's Bench and Lord Cranworth doubted as to the propriety of

(1) 6 H. & N. 227.

(2) 6 H. & N. 227; S. C. 30 L. J. N. S. Ex. 40; 6 Jur. N. S. 1212.

(3) 6 H. & N. 227.

(4) L. R. 3 Q. B. 160.

(5) 6 H. & N. 227.

(6) L. R. 3 Q. B. 160.

(7) 6 H. & N. 227.

(8) 6 H. & N. 227.

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giving a retrospective interpretation to the statute, it is tolerably evident that, in such a case as the present, where the judgment-debtors had not only brought their actions, but obtained decrees and execution of them before the passing of the new Code, those learned Judges would shrink from giving a retrospective construction to section 342, set, as it is, in a chapter and sub-chapter, in both of which every other provision is exclusively prospective. To give to such an enactment as section 342 a retrospective construction, would be no mere alteration of procedure, but a distinct deprivation of a vested right to keep the debtor in prison for two years, subject to such application as he might make under the Insolvent Debtors' Act, or sections 280 and 281 of the old Civil Procedure Code, both of which enactments invlove a *cessio bonorum* or surrender of his property for the benefit of creditors before the debtor applying for the benefit for those enactments could obtain his discharge.

The postponement of the operation of the statute, referred to in *Wright* v. *Hale*[1] by Pollock, C.B., as a reason for holding it to be retrospective, because the plaintiff might have discontinued his action on the passing of the statute, cannot be successfully resorted to in this case, although the operation of the new Civil Procedure Code was deferred for some months after it was passed. No effort that the judgment-creditors here could have made, would have enabled them to detain their debtors for two years in a few months. For the same reason the deferring of the operation of the statutes on which *Towler* v. *Chatterton*,[2] and lately here *Ramchandra* v. *Soma*,[3] and *Abdul Karim* v. *Manji Hansraj*[4] where decided, is an argument inapplicable here. Those two Bombay cases arose on a Limitation Act, and by construing that Act to be retrospective in those cases, we took away no vested right. But when such a construction even of a Limitation Act would divest such a right, that construction will be avoided, as it lately was in *Sitárám Vásudev* v. *Khanderáv Bálkrishna*,[5] and this was so held in that and many other cases there mentioned, although Statutes of Limitation are regarded as Acts regulating

(1) 6 H. & N. 227.
(2) 6 Bing. 258.
(3) I. L. R. 1 Bom. 305, note.
(4) I. L. R. 1 Bom. 295, 302.
(5) I. L. R. 1 Bom. 286.

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procedure : *H. H. Ruckmaboye* v. *Lulloobhoy Motichund.*[1] That such a statute ought not, if possible, to be retrospectively construed, was so recently as the 14th May 1877 decided by the tribunal to which we especially owe allegiance. H. M. Privy Council, which then in *The Delhi and London Bank* v. *Orchard*[2] struggled with the very difficult language of sections 20 and 21 of Act XIV of 1859, and, preferring the F. B. Calcutta decision in 7 Calc. W. R. 515 and the decision in 5 Madras H. C. Rep. 105 to the decision of Couch, C.J., and Newton, J., in 5 Bom. H. C. Rep. 102, made the following remarks :—

"It cannot be disputed that the construction put upon the Act by the High Court at Calcutta, if permissible, was equitable, and prevented what must be admitted to be an inconvenience and injustice. Indeed, if the construction put upon the Act by the High Court at Bombay and by the Chief Court in the Punjab, is correct, a judgment-creditor could not, after the three years, have enforced a judgment which was in force in the Regulation Provinces when Act XIV of 1859 was passed, or a judgment which was in force in the Punjab at the time when the Act was extended to that province, however diligent he might have been in endeavouring to enforce his judgment and however unable, with the use of the utmost diligence, to get at the property of his debtor. Such a construction would cause great inconvenience and injustice, and give the Act an operation which would retrospectively deprive the creditor of a right which he had under the law as it existed in the Regulation Provinces at the time of the passing of the Act, and in the Punjab at the time of the introduction of it. Their Lordships are of opinion that such a construction would be contrary to the intention of the Legislature."

Freeman v. *Moyes*[3] and *Grant* v. *Kemp*[4] were both cases of costs, and stand on much the same basis as *Wright* v. *Hale*.[5] The trial in both of those cases was subsequent to the passing of the statute. Those cases, therefore, are inapplicable on this occasion.

(1) 5 Moore I. A. 234. (2) L. R. 4 Ind. Ap. 127, 135.
(3) 1 A. & E. 338. (4) 2 Cr. & M. 636.
(5) 6 H. & N. 227.

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Ex parte Anderson,(1) cited for the petitioners, is not in point. The interlocutory injunction, there upheld, was a merely temporary proceeding to secure the property during litigation, and neither affected nor took away any right, which circumstances, with respect to the enactments there concerned, was especially noted by Lord Justice Giffard.

The Mercantile Law Amendment Act, 1856 (19 and 20 Vic., chap. 97, sec. 1) enacts that "no writ of *fieri facias* or other writ of execution and no writ of attachment against the goods of a debtor shall prejudice the title to such goods acquired by any person *bonâ fide* and for a valuable consideration before the actual seizure or attachment thereof by virtue of such writ," provided that he had no notice of such writ, &c., which section is expressed in at least as wide language as section 342 of the new Civil Procedure Code, but was, nevertheless, held in *Williams* v. *Smith*(2) not to apply where the writ of execution (a *fieri facias*) was delivered to the sheriff before the passing of the Act. That decision was made in the Exchequer by Pollock, C.B., Bramwell, B., Martin, B., and Watson, B., of whom the two former subsequently took part in *Wright* v. *Hale*.(3) They so decided *Williams* v. *Smith*(4) on the 1st section of the Act, although Kindersley, V. C., had in *Thompson* v. *Waithman*(5) held the 14th section to be retrospective. The Exchequer Chamber, consisting of Erle, J., Vaughan Williams, J., Crompton, J., Crowder, J., Willes, J., and Hill, J.,—a very strong Court,—affirmed the decision of the Exchequer,(6) adopting the doctrine in *Moore* v. *Durden*,(7) that a statute is not to have a retrospective operation unless the intention be clear and express, and approving of *Jackson* v. *Woolley*,(8) in which the Exchequer Chamber overruled *Thompson* v. *Waithman*,(9) they held the 1st section of the Act not to be retrospective. Williams, J., observed: "The *fieri facias* had begun to operate before the statute passed, and was in full vigour at that time. We cannot give the statute a retrospective effect so as to deprive the defendant of any right he possessed under his writ." Before the statute (Mercantile

(1) L. R. 5 Ch. Ap. 473.
(2) 2 H. & N. 443.
(3) 6 H. & N. 227.
(4) 2 H. & N. 443.
(5) 3 Dr. 628.
(6) 4 H. & N. 559.
(7) 2 Ex. 22.
(8) 8 E. & B. 784.
(9) 3 Dr. 628.

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Law Amendment Act, 1856,) the delivery of the writ to the sheriff bound the goods as is said in the passage in 1 Wms. Saunders 219, g., 6th ed., quoted by Martin, B., in 2 H. & N. 444:—"The meaning of the expression (in 29 Car. 2, c. 3, s. 16) that the property in the goods is bound, is not that the property in them is *altered*, for such alteration does not, nor ever did, take place until actual sale of the goods under the writ: but that the defendant, from the time they are bound, cannot dispose of them unless in market overt, so as to prevent their being taken in execution."(1) It was necessary before the execution was consummated to sell the goods, a proceeding by the Court, through its officer the sheriff, which yet remained to be taken after the Act was passed, and yet the Court of Exchequer and the Exchequer Chamber did not apply the principle that because the Act related to procedure (viz., by regulating the manner in which its writ of *fieri facias* should affect the goods of judgment-debtors) it should receive a retrospective construction, and the reason that influenced the Court was that, albeit the Act related to procedure, yet it would, if construed retrospectively, have deprived the creditor of his vested right under the previous law. The argument was, in that case, in vain used that the Court by refusing to construe the statute retrospectively, was virtually interpolating after the words "no writ of execution" the words "hereafter issued," which were not to be found in the statute,(2) and it was general in its terms. *Freeman* v. *Moyes* (3)and *Towler* v. *Chatterton*(4) were then cited in vain. The present case is more strongly in favour of the creditors than *Williams* v. *Smith*,(5) for in this case the judgment-creditors had not to call upon the Court to take any further steps to perfect their executions against the persons of their debtors, who had been finally committed towards satisfaction of the decrees before the new Code came into force. To construe section 342 of the new Code retrospectively, and thus to shorten the imprisonment of the debtors, would be to stop the satisfaction of their decree and to destroy their vested

(1) And see *per* Alderson, J., 9 Bing. 160, and *per* Patteson, J., 9 Bing. 137, in *Giles* v. *Grover*; also 2 Bom. H. C. Rep. 155, 2nd Ed., 5 Bom. H. C. Rep. 27 O. C. J.

(2) 2 H. & N. 445.

(3) 1 A. & E. 338.

(4) 6 Bing. 258.

(5) 2 H. & N. 443.

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right. The fact that their right to detain was qualified and controlled by the Insolvent Debtors' Act and by sections 280 and 281 of the old Code, cannot affect the argument. The existence of that qualification only, in certain contingencies that have not happened, narrows, but does not destroy, the right of detention, which still remains though so qualified and controlled.

Pardo v. *Bingham*,(1) which held the 10th section of the Mercantile Law Amendment Act to be retrospective, and which was founded on *Cornill* v. *Hudson*,(2) cannot be regarded as in any respect affecting the authority of *Williams* v. *Smith*,(3) which was decided on the 1st section of that Act, or of *Jackson* v. *Woolley*,(4) which was decided on the 14th section of it; and although Lord Hatherley in *Pardo* v. *Bingham* observed that in *Jackson* v. *Woolley*(6) the Judges omitted to mention *Cornill* v. *Hudson*,(7) yet it having been decided in November 1857 by Lord Campbell, C.J., Coleridge, Wightman, and Erle, JJ., of whom the three first named, together with Crompton, J., decided *Jackson* v. *Woolley*(8) in January 1858, must have been distinctly present in the mind of the Court on the latter occasion, more then three months not having intervened between the two cases. The Court of Queen's Bench, in deciding *Jackson* v. *Woolley* (9) as it did, and in not then mentioning *Cornill* v. *Hudson*,(10) its earlier decision, showed that it considered that the one did not conflict with the other. Lord Hatherley, moreover, is careful to note that the decisions in *Moon* v. *Durden*(11) and in *Jackson* v. *Woolley*(12) turned upon the circumstance that, to have in these cases held the enactments, there under consideration, to be retrospective, would have been to take away a vested right of action. His Lordship did not venture to impeach either of those decisions, or *Williams* v. *Smith*,(13) which was also cited to him. *Cornill* v. *Hudson*(14) was cited to the Exchequer

(1) L. R. 4 Ch. Ap. 735.
(2) 8 E. & B. 429.
(3) 2 H. & N. 443.
(4) 8 E. & B. 784.
(5) L. R. 4 Ch. Ap. 735.
(6) 8 E. & B. 784.
(7) 8 E. & B. 429.
(8) 8 E. & B. 784.
(9) 8 E. & B. 784.
(10) 8 E. & B. 429.
(11) 2 Ex. 22.
(12) 8 E. & B. 784.
(13) 2 H. & N. 443.
(14) 8 E. & B. 429.

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Chamber in *Jackson* v. *Woolley*(1) without effect, no doubt for this manifest reason, that it was not in point. Nor is *De Wolf* v. *Lindsell*(2) in point, it having been decided on the 5th section of the same Act. The authority of *Williams* v. *Smith*(3) was, however, there distinctly recognized by Lord Romilly. Even if *Cornill* v. *Hudson*(4) were in point (which it is not), it, having been decided by the Queen's Bench, rests upon authority inferior to *Jackson* v. *Woolley*(5) and *Williams* v. *Smith*,(6) both of those cases having been decided by the Exchequer Chamber.

The case of *Pryor* v. *Pryor*,(7) decided by Vice-Chancellor Bacon in 1875, is illustrative of the same principle as *Williams* v. *Smith*.(8) The usual decree had been made in 1864 in the suit for partition, with liberty for any of the parties before the commission for partition issued "to carry in proposals for a sale or for a partition before the Judge in Chambers." Before any commission for partition issued in execution of that decree some of the parties sought from the Court, by supplemental bill filed in 1873, a sale in lieu of a partition, and relied on the New Partition Act (31 and 32 Vic., c. 40) passed in 1868, of which the 3rd section empowers the Court of Chancery "in a suit for partition, where, if this Act had not been passed, a partition might have been made," if it thinks such a course desirable to direct a sale of the estate and distribution of the proceeds in lieu of a partition of the estate "on the request of any of the parties interested and notwithstanding the dissent or disability of any other of them." Some of the parties in the suit did object to a sale, and the Vice-Chancellor, being of opinion that, under the decree, a sale could not have been made against the will of any party, refused to give such a retrospective effect to the subsequently passed statute of 1868 as to hold himself authorized to take away their vested right to prevent a sale and to insist upon a partition. Although, as I have said, the commission of partition had not yet issued, he said:—"This was a suit which was over and done with and gone before the Act of Parliament was passed. In my opinion, there-

(1) 8 E. & B. 784, 786.
(2) L. R. 5 Eq. 209.
(3) 2 H. & N. 443.
(4) 8 E. & B. 429.
(5) 8 E. & B. 784.
(6) 2 H. & N. 443.
(7) L. R. 19 Eq. 595.
(8) 2 H. & N. 443.

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fore, against the will of the parties interested there can be no sale, or anything but a partition." His decision was affirmed on appeal by Lords Justices James and Mellish.[1] That case deserves attention; the section in the new statute relied upon being strictly one to regulate procedure, and the language of that section being not insusceptible of a retrospective construction. Yet the Courts refused to give that construction, because it would take away an existing right under a then unexecuted decree, and that, too, a right to insist upon a particular course of procedure after decree, viz., a partition of the estate in preference to a sale of it and distribution of the proceeds.

In *Moon* v. *Durden*[2] Rolfe, B., said :—"I do not mean, of course, to say that an enactment may not be so made as to have a retrospective operation. In some cases the Legislature has thought it just to make enactments retrospective even at some sacrifice of general principles. But then it does so in express terms; and generally, I believe invariably, couples the retrospective enactment with the best indemnity in favour of vested rights which the nature of the case admits." He then proceeds to say that the statute then under consideration of the Court of Exchequer was an illustration of his last-quoted observation.[3] Baron Parke, while admitting that the rule against a retrospective construction "will certainly yield to the intention of the Legislature; and the question in this and in every other similar case is whether that intention has been sufficiently expressed," and that he felt "considerable doubt" whether or not that was so as to the Act then under consideration (Statute 8 and 9 Vic., c. 109, section 8,) declaring that all wagering contracts shall be void, and that "no suit shall be brought *or maintained*" upon them; and while on the one hand noticing the hardship of holding that past wagering contracts should be rendered void, and the still greater hardship that a party should not be permitted to continue a suit already commenced on such a contract, and on the other hand that the previous toleration of such actions had been a reproach to the law of England, and that "one considers the clause, therefore, not quite in the same spirit as if the enactments related to ordinary contracts," and that in con-

(1) L. R. 10 Ch. Ap. 469. (2) 2 Ex. 22.

(3) 2 Ex. 39.

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struing the enactment prospectively the word "maintained" is rendered inoperative, whereas in construing it retrospectively it is not, nevertheless said: "I think it best to abide by the sound rule of construction above referred to" (the rule against a retrospective interpretation) "notwithstanding the conjectures as to the real intention of the Legislature which the nature of the subject occasions." It is not pretended that there is any such cloud upon the claims of the judgment-creditors here as Baron Parke pointed out in that of parties suing upon wagering contracts as that of the plaintiff in *Moon* v. *Durden*[1] against whom the Court declined to construe the statute retrospectively.

The case of *Sumboochunder Haldar and others*,[2] although, in so far as it turned upon the 12th section of the High Court's Act 24 and 25 Vic., c. 104, it is not in point here, yet is in another respect very useful in showing how very far the High Court of Calcutta was prepared to go, and did go, in determining what should be regarded as a "proceeding pending" at the abolition of the Supreme Court. A decree had been obtained in the Supreme Court against Sumboochunder Haldar, and a writ of *fieri facias* issued upon that judgment against his goods, before the abolition of the Supreme Court, to which writ the sheriff had returned *nulla bona*. Subsequently to the establishment of the High Court a writ of *capias ad satisfaciendum*, in the old form, was issued against him in December 1863, and he was arrested upon it on the 11th February 1864, and the question was whether his arrest should be regulated by Act VIII of 1859 or by Act VII of 1855, and it was unanimously held by the Court (Peacock, C.J., Morgan and Phear, JJ.) that although the *ca. sa.* was issued against his person by the High Court, it must be regarded as a continuation of the former process of execution commenced in the Supreme Court against his property, and, as such, must be deemed a proceeding pending at the time of the abolition of the Supreme Court, and was accordingly saved by section 12 of the High Court's Act, and, therefore, regulated by Act VII of 1855 and not by Act VIII of 1859. In coming to this conclusion, Phear, J., seems to have departed from the view which he took in

(1) 2 Ex. 22. (2) 1 Bourke 69.

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1864 in a previous case, *in re Muddoosoodan Dass*,(1) which he passed over in silence in *Sumboochunder Haldar's case*.(2) In the case in 2 Hyde's Reports, section 12 of the charter is named by mistake for section 12 of the High Court's Act. In the case before us it is unnecessary to go so far in construing the words "proceedings commenced" contained in the General Clauses Act, section 6, as the High Court at Calcutta went in holding the *ca. sa.* issued by itself to be a proceeding pending at the abolition of the Supreme Court within section 12 of the High Court's Act in virtue of its having been preceded by a *fieri facias* issued by the Supreme Court and a return of *nulla bona* by the sheriff. Here both the arrest and committal had taken place before the new Code came into force.

In conclusion, let me ask whether, if section 342 of the new Code instead of the words "six months" had used the words "four years," we should have been invited to construe that section retrospectively? And yet the substitution of the one period for the other could not in any wise affect the question whether that section ought to be construed prospectively or retrospectively. The possibility of such a change of period is a caution to us not to depart from the established rules of construction, and to set sail upon the ocean of conjecture. It is notorious that supposed hard cases have a tendency to make bad law, or, in other words, to produce erroneous decisions. The very case now suggested, which would be the converse of that before us to-day, arose in France. A law of the time of the First Revolution limited civil imprisonment to five years, but subsequently by the Code Civil of Napoleon the duration of it was prolonged. The Judges, declining to give retroactivity to the new provision, held debtors imprisoned under the previous repealed law to be entitled to the benefit of it. (Dalloz Repertoire, Vol. 30, Tit. Lois, Chap. Art. 2, section 8, plac. 394, p. 152.) The doctrine, then, that laws regulating procedure are in all cases, unless the contrary distinctly appears on the face of the enactment, to be deemed to look backwards as well as forwards, was not then permitted to prevail in the French Courts, even when under the despotic *régime* of the First Empire. With-

(1) 2 Hyde 215. (2) 1 Bourke 69.

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out hesitation it must be admitted that the Governor-General in his Legislative Council has full authority to pass retrospective laws even to the divestment of vested rights; but we are entitled to expect that, when such is the intention, it will be rendered apparent either by expression or unmistakeable indication on the face of the law itself. In the absence of any such guides to the ascertainment of the intention, the presumption is that a statute depriving the subject of a vested right is not retrospective. It may well be that such a presumption does not exist where a statute is remedial and merely alters procedure, and that the Courts are bound to advance the remedy and apply the improvement in procedure retrospectively as was done to a limited extent in *Wright* v. *Hale* (1) and the cases dependent on its authority; but if the change in procedure, when sought to be applied retrospectively, be complicated by the divestment of a pre-existing right, then I think that the presumption against such an intention revives in its full strength, and that the decided cases do not justify any other doctrine. It would be arrogant, and more especially so when there is a divided Court, to claim any certain knowledge of the intention of the Indian Legislature when it placed section 342 of the new Code on the statute book with respect to its retroactivity. The provision, which we find in the General Clauses Act, prevents any *à priori* argument that the Indian Legislature would lightly set aside or interfere with things done or proceedings pending under Acts which it repeals. That Legislature had before it two examples afforded by Parliament, which, in the High Court's Act *passed for India*, section 12, carefully kept alive proceedings pending in the Supreme Court at its abolition, and in the Act for the abolition of imprisonment for debt, *passed for England*, expressly interfered with pending proceedings, in declaring persons then in civil custody entitled to their freedom. To the best of my judgment, the Indian Legislature has, in passing section 342 of the new Code with no further explanation than section 3 of the same, followed the former example, and has silently but intentionally left the new Code to the operation of the provision in the General Clauses Act which it has in distinct and positive terms

(1) 6 H. & N. 227.

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laid down for the guidance of Courts of justice in construing its ordinances—a provision which does not war with the special enactment contained in section 3 of the new Code.

For these reasons I think that section 342 should be read as prospective only, and that the petitioners must consequently fail in their application for discharge from prison. The general importance of the question and the division of opinion in the Court will furnish the apology for the length of my remarks.

SARGENT, J.:—The question which the Court has to determine is whether judgment-debtors who had been in prison, in execution of the decrees obtained against them, for more than six months at the date on which the New Civil Procedure Code (Act X of 1877) came into operation, are entitled to be discharged from prison under sections 341 and 342 of that Act or either of them.

The 1st of those sections says that "The judgment-debtor shall be discharged from jail when the time of his imprisonment as limited by section 342 is fulfilled," and section 342 declares that "No person shall be imprisoned in execution of a decree for a longer period than six months." The case of the petitioners, it must be admitted, comes rather within the spirit than the exact terms of section 341 ; the language of that section, however, does apply with perfect accuracy to a case which cannot be distinguished in principle from that of the petitioners, viz., that in which the term of six months, although commencing before the Act came into operation, expires subsequently to that date. Section 342 is in terms strictly applicable to all persons under imprisonment. I think, therefore, the answer to the petitioner's application ought to depend upon the determination of the question whether the sections are applicable to the case of judgment-debtors imprisoned before the Act came into operation.

Now, sections 1 and 3 show a clear intention of the Legislature to enact a new Code of Civil Procedure which should take the place of all existing enactments on that subject. Section 3, however, concludes with a proviso in the negative form that "nothing therein contained shall affect the procedure prior to decree in any suit instituted before the Act came into force." I think that the natural conclusion from the language of these sections

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taken in connexion with Act I of 1868, section 6, is that whilst saving all acts already done in execution of a decree in a suit instituted before the Act came into force, all matters of procedure in execution subsequent that date should be determined by the Act itself. Before proceeding further to consider the construction of the Act, I may say that I can entertain no doubt that the question before the Court is one of procedure. The writ of imprisonment is by its very nature continuous in its operation, and the conditions and period under and for which it remains in force and activity are as much matters relating to procedure as the issuing of the writ itself. The term "procedure" has never, that I am aware of, been confined to mere proceedings; but in any case I cannot doubt that the maximum duration of a judgment-debtor's imprisonment is a matter of procedure in the sense in which that term is used in the present Act.

Whilst, therefore, the warrant of imprisonment, and all that has been done under that warrant, are unaffected by the repeal of Act VIII of 1859, the further operation of the warrant becomes a question of procedure to be determined by the provisions of the new Code.

It was suggested during the argument by Mr. Justice West that sections 341 and 342 must, from their connexion with other sections, have been intended to apply only to cases where the imprisonment has commenced subsequently to the date at which the Act came into operation. It was said that section 342 being in the negative form, necessarily supposes a state of imprisonment previously created by the Act. This seems to me to be rather begging the question in dispute. I admit that the language of the section assumes an existing state of imprisonment, but not necessarily one under a warrant issued under the Act itself. In the same way, there is nothing which necessarily confines the term "imprisonment" in the heading of sub-chapter I, in which the sections are found, to imprisonment commenced since the Act came into operation. This time it is associated with arrest, which must mean arrest since the Act came into operation, but it is not necessarily associated with it otherwise than as one of the subjects to be dealt with by that sub-section. The order of arrest is distinct from that of imprisonment,

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and the latter does not necessarily follow upon the former. It is said, however, that if section 342 be applied to warrants of imprisonment before the Act came into force, the Act will operate to defeat an existing right, that right being, it is said, to detain the judgment-debtor in prison under the warrant for two years in default of his sooner satisfying his debts. This argument has, doubtless, considerable force, and has caused me to hesitate much in coming to my decision upon the construction of the Act. I think it is impossible to contend that the judgment-creditor does not by attachment of his debtor's property, as well as by the arrest and imprisonment of his debtor, acquire a right of a very distinct and specific nature and different from the mere right of a plaintiff to have his cause of action tried according to a certain procedure, and which the Judges in *Wright* v. *Hale*[1] refused to recognize. The well-established rule, however, that an Act is not to be construed so as to defeat an existing right, is, as Parke, B., says in *Moon* v. *Durden*,[2] only a rule of construction, and must yield to the intention of the Legislature; and I think that intention may be gathered with sufficient certainty from the language of sections 1 and 3, as I have before explained, coupled with the strong presumption which, in my opinion, arises from the nature of the change in the law. It is difficult to suppose that the Legislature, when introducing a most important and benign change in the law of debtor and creditor, in harmony with modern legislation, could have intended that the two laws should continue for the next two years to operate concurrently, and that debtors who were imprisoned on the day previous to that on which the Act came into operation,—and there must be many throughout British India—should be liable to be detained under the severer enactment. Moreover, it is to be remarked that the Act received the assent of the Governor-General on 13th March 1877, but did not come into operation until 1st October, thereby giving judgment-creditors due notice of the altered character of their power of imprisonment, a circumstance to which some importance, at least, was attached in giving Lord Tenderden's Act a retrospective effect, as shown by the judgment of Parke, J., in *Towler* v. *Chatterton*.[3] Upon the whole, I think that sections 341 and 342

(1) 6 H. & N. 227. (2) 2 Exch. 22. (3) 6 Bing. 258.

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were intended to come into force at once from the time when the Act came into operation, and that the petitioners are entitled to their discharge.

BAYLEY, J. :—This matter was argued on the 5th instant before a full Court consisting of the Chief Justice, Sir C. Sargent, Green, West, JJ., and myself, by Mr. Macpherson for the petitioner Ratansi Kaliánji, and by Mr. Inverarity for Trikamdás Shivrám, the detaining creditor of Ratansi Kaliánji.

Ratansi Kaliánji was, on the 31st October 1876, duly imprisoned under an order and warrant in execution of a decree of the High Court issued in the usual form for non-payment of money under the provisions of the recently repealed Code of Civil Procedure (Act VIII of 1859), and as he has now been in custody for a period of nearly twelve months, he claims the benefit of sections 341 and 342 of "the Code of Civil Procedure," Act X of 1877 (which came into force on the 1st day of October 1877), the latter of which sections enacts that "no person shall be imprisoned in execution of a decree for a longer period than six months."

The warrant, under which the petitioner was sent to jail, does not specify any definite time of two years during which he is to be imprisoned. It was urged on behalf of Trikamdás Shivrám, the detaining creditor, that he had a right to detain his judgment-debtor, the petitioner Ratansi Kaliánji, in prison for two years, the period mentioned in section 278 of the Civil Procedure Code of 1859, unless he had before then paid the decree, or unless the detaining creditor failed to pay the subsistence-money. For the petitioner it wa surged that clause 342 of the new Act was retrospective, the provision in it being one of mere procedure.

The principles of interpretation applicable to such a question did not appear to be disputed at the bar. The real contention was as to their application to the point at issue.

The canon of construction relied upon on the part of the petitioner is that stated in the case of *Wright* v. *Hale*,[1] decided by

[1] 6 H. & N. 227; S. C. 30 L. J. N. S. Exch. 40.

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the Court of Exchequer at Westminster in 1860, the report in the Law Journal being by far the fullest and most complete.

The question there arose under the Common Law Procedure Act of 1860 (23 and 24 Vic., chap. 126, sec. 34) which enacted that when the plaintiff in any action for an alleged wrong in any of the superior courts, recovered by the verdict of a jury less than £5, he should not be entitled to any costs, in case the Judge certified that the action was not really brought to try a right besides the mere right to recover damages, and that the trespass or damage, in respect of which the action was brought, was not wilful and malicious, and that the action was not fit to be brought. The Court held that such section applied to actions tried after, although commenced before, that Act came into operation.

Pollock, C.B., said: "I have always understood that there is a considerable difference between laws which affect the vested rights and interests of parties and those laws whcih merely affect the proceedings of Courts. For instance, if an Act of Parliament were to say that in matters of mere opinion and judgment no person shall be allowed to call more than three witnesses, I think that would apply to all actions whether then pending, or thereafter to be brought. It would be a matter regulating the practice * * * . I do not think that a matter of that sort can be called a right, nor do I think the title to costs can be called a right in any sense in which Lord Coke in his Institutes, or my Lord Chief Justice Truro, in the case referred to by Mr. Chambers (*Marsh* v. *Higgins*[1],) has spoken of rights * * * In this case the Act was not to take effect until the 10th October 1860, and then in October it is as if it had said, 'on the 10th October this Act of Parliament is to take effect.' What is the effect? Why, where the plaintiff in any action—'in any action' means in any action brought yesterday or seven years ago —for an alleged wrong in any of the superior Courts recovers less than £5, he shall not be entitled to costs, if the Judge shall certify certain facts. I think that when in any action the statute having come into operation the plaintiff recovers less than £5,

(1) C. B. 551; see p. 567.

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that then he is subject to this clause. In my opinion it is not a retrospective Act at all. The sort of wrong which is supposed to be done by an *ex post facto* law, in my opinion, does not arise, and on this ground it appears to me that the rule ought to be discharged."

Channel, B., said he thought that the case was concluded by the authorities cited on the statutes which regulate costs, and he added:—"*Freeman* v *Moyes*[1] is not distinguishable, I think, from the present case, and I believe that decision has been concurred in by all the Courts in Westminster Hall;" (that, I may state, was a decision upon the 3 and 4 Wil. IV, c. 42, s. 31, which enacted that, "in every action brought" by an executor, the plaintiff shall be liable to costs, and it was held that such provision was retrospective).

Wilde, B., (now Lord Penzance) in his judgment stated the rule of construction with great clearness and precision. He said:—

"I am prepared to decide the case on principle. And the principle that seems to me to be applicable to the case is this—that where you are dealing with a right of action, and an Act of Parliament passes, unless something express is contained in that Act the right of action is not taken away; but where you are dealing with mere procedure, unless something is said to the contrary, and the language in its terms applies to all actions, whether before or after the Act, there I think the principle is that the Act does apply without reference to the former law or procedure. Now that that is the principle, appears from the cases that have been cited on both sides. Because the cases cited by Mr. Chambers are cases of rights of action not interfered with, and the cases on the other side are cases of procedure or evidence in which the Acts are held to be retrospective. The cases involve three or four analogies which are as close as analogies can be; one, the case of executors, who, by an Act of Parliament, are made liable to pay costs, and all the Courts have applied that to the case of executors who brought actions before the Act. Another is the case where the rule made under the powers of an Act of Parliament prescrib-

[1] 1 A. & E. 338.

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ed that the plaintiff should only have the costs on the issues on which he succeeded; and although the terms were just as general as the terms of the others, it was by all the Courts applied to all actions that were then pending. Mr. Chambers says this is taking away the right; and I do not agree with him, for this reason.—What is the right the suitor has? The right of action is the right to bring the action; and what is the right to bring the action? Why, to have it conducted in the way and according to the practice of the Court in which he brings it; and if any Act of Parliament, or any rule founded on the authority of an Act of Parliament, alters the mode of procedure, then he has a right to have it conducted in that altered mode. That, therefore, takes away nothing; the right of action does not involve the right to keep all the consequences of that right as they were before. It gives him the right to have the action conducted according to the rules that are then in force with respect to procedure. In this case, therefore, it seems to me there is no right taken away, and deciding the case strictly on the principle on which all other cases are decided that the rule" (which was to set aside a certificate of Bramwell, B., indorsed on the record) "clearly ought to be discharged." And it was accordingly discharged with costs.

In 1864 that decision was cited with approval by Lord Wensleydale in the House of Lords in the case of *The Attorney General* v. *Sillem and others.* (1)

He says (p. 763):—"There is no doubt of the justice of the rule laid down by Lord Coke (2 Inst. 292) that enactments in a statute are generally to be construed to be prospective and to regulate the future conduct of parties. But this rule of construction would yield to the intention of the Legislature. It could not be supposed that the Legislature meant to deprive a man of a vested right of action. This was laid down in *Moon* v. *Durden.*(2)

"But, on the other hand, it is clear that there is a material difference when an Act of Parliament is dealing with a right of action already vested, not intended to be taken away, and when it is dealing with mere procedure to recover those rights, which

(1) 10 H. L. C. 704. (2) 2 Exch. 22.

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it may be quite reasonable to regulate and alter. This has been most clearly and satisfactorily explained in the case of *Wright* v. *Hale*,[1] particularly by Sir James Wilde." And then, after citing the decision, he adds :—"Sir James Wilde says, with truth, that this does not take away any right."

The principle of *Wright* v. *Hale*[2] was, in 1860, acted on by the Court of Queen's Bench in the case of *Kimbray* v. *Draper*.[3]

It was also expressly adopted in the High Court of Bombay by Chief Justice Couch, and Newton and Sargent, JJ., in the case of *Framji Bomanji*,[4] where a difficulty had arisen in consequence of a difference between the provisions of the Letters Patent of 1862 and the Amended Letters Patent of 1865 as to the right of appeal. The Court there held that a right of action is not taken away by a change in the law unless by express enactment ; but in the case of mere procedure, unless something is said to the contrary, the new law, where its language is general in its terms, applies without reference to the former law or procedure.

Now, it was contended in behalf of the execution-creditor that he had, until satisfaction or failure in payment of subsistence-money, the right to detain his judgment-debtor for two years, and that to apply the doctrine of *Wright* v. *Hale*[5] to the present case and to give to section 342 of Act X of 1877 a retrospective operation, would deprive him of that right, which, as I understood the argument, was said to be of almost as sacred and inviolable a nature as a right of action.

Is that contention reasonable, or is it not ? Before considering the nature of execution of decrees by imprisonment under the Code of Civil Procedure of 1859, I will make a few remarks upon the practice as it stood in England before recent legislation there, and as it existed in the late Supreme Court in Bombay.

Speaking of the writ of *capias ad satisfaciendum*, Blackstone says that "the intent of this writ is to imprison the body of the debtor till satisfaction be made for the debt, damages, and costs." "It is" (he says) "an execution of the highest nature, inasmuch

(1) 6 H. & N. 227. (2) 6 H. & N. 227.
(3) L. R. 3 Q. B. 160. (4) 3 Bom. H. C. Rep. O. C. J. 49.
(5) 6 H. & N. 227.

as it deprives a man of his liberty till he makes the satisfaction awarded ; and, therefore, when a man is once taken in execution under it, no other process can be sued out against his lands or goods."(1)

In *Taylor* v. *Waters*(2) Lord Ellenborough, Chief Justice, said :— "The taking of the body in execution does not extinguish the debt, but it bars the remedy against the debtor, and in like manner precludes a set off against him." And Mr. Justice Bayley said : —"The taking him in execution destroys all remedy against him during his life."

Those *dicta* were cited with approval in *Thompson* v. *Parish*,(3) in which case Sir Alexander Cockburn, Chief Justice, said (p. 692) :—"The effect of taking the debtor in execution is to suspend all other remedies against him for the debt."

Even the dead body of an unfortunate judgment-debtor, who died in gaol while detained there under a *ca. sa.*, has been the subject of litigation, for, where a gaoler refused to deliver up the body to the executors of the deceased unless they would satisfy certain claims made against the deceased by the gaoler, the Court of Queen's Bench issued a *mandamus*, peremptory in the first instance, commanding that the body should be delivered up to the executors ; and at the subsequent trial of Scott, the gaoler at the York assizes, before Maule, J., the Judge said that the notion of a gaoler being authorized to detain a dead body on account of pecuniary claims was a mistake ; and that a gaoler doing so was guilty of a misconduct in his public character, for which he was liable to prosecution : *The Queen* v. *Fox*.(4)

The practice in the late Supreme Court of Bombay was different, and far more favourable to the creditor. By the charter establishing that Court, dated the 8th December 1823, clause XXXIV, power was given to the Supreme Court to award execution against the houses, lands, debts and other effects, real and personal, of the debtor, "or to take and imprison the body or bodies of such party or parties until he, she, or they shall make satisfaction, or to do both as the case may require."

(1) 3 Black. Com. 414. (2) 5 M. & Selw. 103.
(3) 5 C. B. N. S. 685. (4) 2 Q. B. 246.

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By Act VI of 1855 of the Government of India, "*An Act to extend the operation of and regulate the mode of executing writs of execution in Her Majesty's Supreme Courts of Judicature,*" and which is published at p. 139 of Vol. I of "The unrepealed General Acts of the Governor-General in Council," issued by the Legislative Department of the Government of India in 1875, section 8, it was enacted that "a plaintiff or defendant, arrested under any writ of *capias ad satisfaciendum* issued upon any judgment, order, decree or sentence of any of the said Courts, whereby money is ordered to be paid to any party, shall be entitled to his discharge from such arrest on payment or tender to such party or his attorney in the cause or to the sheriff or gaoler in whose custody such person may be under such writ of the amount directed to be levied by such writ."

Section 9 declares when a written order under the hand of the attorney issuing such writ shall be sufficient for the discharge of the party by the sheriff or gaoler.

It appears, therefore, that formerly in England and in Bombay, until the Supreme Court abolished in 1862 on the introduction of the High Court, the power of the judgment-creditor to keep his judgment-debtor in prison lasted until the latter paid or tendered the amount directed to be levied, or unless he was released by virtue of the provisions of the Statute 11 and 12 Vic., chap. 21, the Indian Insolvent Act, and that if he failed to obtain his release in one of those modes, or unless he was discharged under the written order of the judgment-creditor's attorney (Act VI of 1855, section 9), he might remain in gaol until his death.

It will be noticed, too, that, under the charter of the late Supreme Court, execution might issue by the attachment and sale of the judgment-debtor's moveable and immoveable property, or by his imprisonment, or by all those modes at once.

By the Letters Patent of 1862, establishing the High Court of Bombay, cl. 37, the proceedings in civil suits between party and party brought in the High Court were directed to be regulated by the Code of Civil Procedure, Act VIII of 1859.

This brings me to the consideration of the recently repealed Code of Civil Procedure (Act VIII of 1859), upon the provisions of which the judgment-creditor, in the case now before us, relies.

The sections relating to the imprisonment of the party against whom a money decree has been made, are familiar to all of us, and require no lengthened notice from me.

Section 201 relates to the execution of decrees for money. Section 212 provides for the form and contents of the application for execution. Section 221 for the issue of the warrants of execution. Section 273 (a new and important provision) enacts that any person arrested under a warrant in execution of a decree for money may, on being brought before the Court, apply for his discharge on the ground that he has no present means of paying the debt either wholly or in part, or if possessed of any property, that he is willing to place it at the disposal of the Court. It provides, too, for the form of the application which is to be subscribed and verified by the applicant in the manner prescribed for subscribing and verifying plaints.

By section 276, which is printed under the general heading "*Of the execution of decrees by imprisonment*," provision is made for the subsistence money of a defendant in gaol. Section 277 gives power to the Court to vary the allowance in case of illness or for other special cause. Then follows the important section, section 278, as to the release of a defendant and the limit to imprisonment, and upon which so much turns. The section is in these words :—

"278. A defendant shall be released at any time on the decree being fully satisfied, or at the request of the person at whose instance he may have been imprisoned, or on such person omitting to pay the allowance as above directed. *No person shall be imprisoned on account of a decree for a longer period than two years*, or for a longer period than six months if the decree be for the payment of money not exceeding Rs. 500, or for a longer period than three months if the decree be for the payment of money not exceeding Rs. 50."

Section 279 provides that subsistence money shall be added to the costs of the decree, and shall be recoverable by the attachment

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and sale of the debtor's property, but that he shall not be detained in custody or arrested on account of any sums so disbursed.

Section 280 (also, I believe, a new provision) gives power to any person in confinement under a decree to apply to the Court for his discharge on the surrender of his property, such application to be subscribed and verified by the applicant as plaints are subscribed and verified.

Section 281 states what procedure shall be adopted on such application, and under what circumstances the Court shall cause the defendant to be set at liberty.

Section 282 enacts that "a defendant once discharged shall not again be imprisoned on account of the same decree except under the operation of the last preceding section, but his property shall continue liable, under the ordinary rules, to attachment and sale until the decree shall be fully satisfied, unless the decree shall be for a sum less than Rs. 100 and on account of a transaction bearing date subsequently to the passing of this Act," and power is then given to the Court to declare a defendant so discharged absolved from further liability under that decree.

Section 283, the last one of the series under the general heading "Of the execution of decrees by imprisonment," relates to the determination of questions as to mesne profits and interest and of sums paid in satisfaction of decrees, and was repealed by Act XXIII of 1861, section 1, and section 11 of that Act was substituted for it.

It will thus be seen that these provisions which I have cited from chapter IV of the Code of 1859 make several very important alterations in the relative position of judgment-creditor and judgment-debtor under money decrees of the High Courts as compared with the position of decree-holders and their debtors under the late Supreme Court; and so far as I am aware, for the first time in the presidency towns, the term of imprisonment under a *ca. sa.* issued on account of a decree was (by section 278) limited to two years. The important provisions, too, in sections 273 and 280 were, I believe, novel, and they placed further limits upon the power of the creditor to detain his judgment-debtor in prison.

In a case which came before the High Court in Calcutta in 1874 upon the construction of section 273, it was held by Chief Justice

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Couch, Macpherson and Pontifex, JJ., that the general design of the provisions in section 273 and the following sections of Act VIII of 1859 is that a man is not to be needlessly and uselessly detained in prison. Imprisonment is not to be arbitrary and capricious. There must be some object in it to oblige the debtor to make a full disclosure of his property, and to prevent him from fraudulently concealing property which might be taken in execution of the decree; and that the scope of those provisions does not require that he should be committed to prison for what would not be a legitimate advantage to the creditor, *e.g.*, in order to oblige him to borrow from others to pay his judgment-creditor: *Coombe* v. *Caw*.[1] I may remark that this language appears to me to be quite inconsistent with the right, the inviolable right, of the judgment-creditor, claimed for him by Mr. Inverarity.

The sections I have cited from the Code of 1859, including section 278, which limits the term of imprisonment to two years, are, in my opinion, clearly sections relating to procedure and to procedure alone. They set forth the practice which must be followed by a decree-holder who seeks the aid of the Court to enable him to reap the fruits of the decree which the Court has passed in his favour.

I do not consider that section 273 gives the execution-creditor any such right as that contended for by Mr. Inverarity. He can only work out his decree and obtain execution under it in the mode prescribed by the Indian Legislature,—a mode which differ greatly from that adopted for centuries and until a comparatively recent period in England.

To describe the power, which the execution-creditor in India has had in the presidency towns since 1862, of putting and keeping his judgment-debtor in prison as an inviolable *right*, or anything equivalent to it, is, in my opinion, fallacious and calculated to lead to erroneous impressions. His power to invoke the aid of the Court for the purpose of placing his judgment-debtor in gaol, and of keeping him there for a period not exceeding two years (unless previously liberated by one of the several ways open to a debtor to obtain his discharge), was a power given to such

(1) 22 Calc. W. Rep., 257 Civ. Rul.; 13 Beng. L. Rep., 268.

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creditor by the Indian Legislature and by the High Court charters. The maximun limit of two years fixed by the Code of 1859 was in clear derogation of the creditor's power, under the law as it existed in the late Supreme Court, which placed no limit as to the time during which the judgment-debtor might be detained in gaol under a civil decree. And when, as in process of time, the feeling of the manifold injustice of lengthened imprisonment for making default in payment of a sum of money became stronger, one would naturally expect that such change of view would be adopted by the Indian Legislature, and that the limit of two years would be still further reduced.

I may here notice that by the Imperial Insolvent Statute 11 and 12 Vic., c. XXI, s. V., any person in prison within the limits of the towns of Calcutta, Madras, and Bombay, upon any process whatever for, or by reason of, any debt, damages, costs, or money which such person is liable to pay, and being in insolvent circumstances, may, at any time, apply, by petition, to the Court for the Relief of Insolvent Debtors for the benefit of the provisions of that Act.

Nearly midway between the passing of the Civil Procedure Codes of 1859 and 1877, viz., in 1869, the British Parliament passed for England and Wales "*An Act for the abolition of imprisonment for debt and for the punishment of fraudulent debtors and for other purposes*," 32 and 33 Vic., c. 62, and by section IV it was enacted that, with the exceptions thereinafter mentioned, *no person* should, *after the commencement of that Act* (1st January 1870), *be arrested or imprisoned for making default in payment of a sum of money*. By section VII provision was made for the discharge, without payment of any fees, from custody of persons who at the commencement of the Act were in custody in pursuance of any writ, attachment, or other process, and who would not be liable to be arrested or imprisoned after the commencement of that Act; but it was declared that "his arrest, imprisonment, or discharge, shall not affect the creditor's rights or remedies for enforcing the payment of any money due to him, or deprive the creditor of the benefit of any charge or security on any property of the debtor."

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That statute was doubtless present to the minds of the framers of the new Code of 1877. More than one English statute has formed, not merely the model, but almost the text of Acts afterwards passed by the Supreme Legislature in India.

Any such clause in the Act of 1877 as section 7 of the 32 and 33 Vic., c. 62, would, of course, have prevented the point now at issue having arisen at all. The question now for determination is—have or have not the provisions of Act X of 1877 sufficiently declared the intention of the Indian Legislature to be that, after the 1st October 1877, no person, whether in custody before or after that date, shall be detained under a money decree for a longer period than six months ?

Part IX, chapter 48 of the new Civil Procedure Code (Act X of 1877), contains "Special rules relating to the Chartered High Courts," which are comprised in a short series of sections from 631 to 639, both inclusive.

Section 632 enacts that, "Except as provided in this chapter, the provisions of this Code apply to such High Courts."

The definitions of "decree" and "judgment-debtor" in clause 2, the interpretation clause, are sufficiently wide to embrace decrees passed and judgment-debtors who have become such before the 1st October 1877, the day on which the Code is, by section 1, ordered to come into force.

Chapter XIX relates to "The execution of decrees," and consisting of eleven sub-chapters or sub-divisions, extends from section 223 to section 343, both inclusive.

By section 341 it is enacted (*inter alia*) that the judgment-debtor *shall be discharged from jail, when the term of his imprisonment*, as limited by section 342, is fulfilled, and it is declared that a judgment-debtor discharged under that section (section 342) is not thereby discharged from his debt ; but he cannot be arrested under the decree in execution of which he was imprisoned.

Section 342 enacts that "No person shall be imprisoned in execution of a decree for a longer period than six months, or for a longer period than six weeks, if the decree be for the payment of a sum of money not exceeding fifty rupees."

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No doubt the Code itself and the provisions of chapter XIX "Of the execution of decrees" are mainly addressed to suits commenced after the 1st October 1877 ; but many of them, including the important ones in sections 341 and 342, are, in my opinion, equally applicable to proceedings pending when the Act came into operation. Each of the Codes of 1859 and 1877 is a "Code of Civil Procedure," regulating the procedure to be followed by the suitors who resort to civil Courts, and it appears to me to be impossible to suppose that the Indian Legislature did not intend the improvements which are in the new Code to apply to suits brought under the old Code in those cases in which, consistently with the provisions of the new Code, they might, upon the ordinary principles of the interpretation of statutes, be clearly applicable.

By section 3 of Act X of 1877, which, by section 1, is declared to extend to the whole of British India, it is enacted that "Nothing herein contained shall affect the procedure prior to decree in any suit instituted, or appeal presented, before this Code comes into force," thereby implying that the procedure after such a decree shall be according to the provisions of Act X of 1877. The present application is one made subsequent to decree, and must be regulated by the new Code.

I do not feel pressed by the case cited, by Mr. Inverarity, of *Sumboochunder Haldar and others*,[1] quoted at p. 230 of Mr. Broughton's Edition of the Civil Procedure Code of 1859, where it is stated to have been held that the proceedings in execution of a decree in a suit begun under the old Supreme Court Procedure were regulated by Act VII of 1855 and not by the Civil Procedure Code of 1859, and for this reason. By the Imperial Statute authorizing High Courts to be established, 24 and 25 Vic., c. 104, section 12, provision was made as to pending proceedings in the then to be shortly abolished Supreme Courts, and it was thereby enacted that "Such proceedings and all previous proceedings in the said last-mentioned Courts shall be dealt with as if the same had been had in the said High Court, save that any such proceedings may be continued, as nearly as circumstances permit, under and according to the practice of the abolished Courts respectively."

(1) 1 Bourke 69.

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The procedure provided by the Code of 1859 was so radically different from, and for the most part so inapplicable to, suits brought on the Plea Side or Equity Side of the old Supreme Courts, that one is not surprised to find the old procedure retained by the express direction of the statute. The same reason does not exist in the present case, where one Procedure Code is merely substituted for and supplants another, with such alterations and additions as the Legislature has considered that time and experience have shown to be desirable.

In *Williams* v. *Smith*,(1) cited at the bar, the Exchequer Chamber held that the 1st section of "The Mercantile Law Amendment Act, 1856" (19 and 20 Vic., c. 97) did not apply to cases where the writ of *fi. fa.* had been delivered to the sheriff before that Act passed. Williams, J., then said (p. 563) that the *fi. fa.* had begun to operate before the statute passed, and was in full vigour at that time; and that they could not give the statute a retrospective effect, so as to deprive the defendant of any right he possessed under his writ.

In that case to have given the statute a retrospective operation would have entirely deprived the defendant of the fruits of his *fi. fa.* In the present case the construction which appears to me the sound one, does not prevent the imprisonment of the petitioner under the *ca. sa.* issued in October 1876, but merely says that he shall be in prison, not for two years under the old Code, but only for six months, the maximum limit fixed under the new Code. *Williams* v. *Smith*(2) is clearly distinguishable from, and in my judgment has no application to, the present case.

There would also be this further difficulty, viz., that when in October 1878, according to the usual practice, application would be made to the sitting Judge in Chambers for an order to release the petitioner at the expiration of his two years' imprisonment, the Judge would have to act upon section 278 of the old Code, whereas that Code, and along with it section 278, have been repealed as from the 1st October 1877 by section 3 of Act X of 1877.

I have not overlooked "The General Clauses Act, 1868" (Act I of 1868), but I do not think that section 6 of that Act is applicable to the present case.

(1) 4 H. & N. 559. (2) 4 H. & N. 559.

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There is a much more recent decision than the one of *Williams* v. *Smith*,(1) a decision in 1869, upon another section of "The Mercantile Law Amendment Act, 1856," a decision by Lord Chancellor Hatherley. He held that section X of that statute was retrospective, and that even where the cause of action had accrued before that statute was passed, no person was entitled to any time within which to commence an action beyond the time fixed by the statute of limitations by reason of such person being beyond the seas when the cause of action accrued : *Pardo* v. *Bingham*.(2) The Lord Chancellor said that there had been a decision upon that 10th section by the Court of Queen's Bench in *Corvill* v. *Hudson*,(3) the Judges consisting of Lord Campbell, Coleridge, Wightman, and Erle, JJ., and they held that as regards the 10th section the statute was retrospective. That case, he says, was not carried further by error, and as far as he knew had been the ruling authority ever since. He then stated that the general rule of law was that except there be a clear indication, either from the subject-matter or from the wording of a statute, the statute is not to have a retrospective construction. The Lord Chancellor then cites *Moon* v. *Durden*,(4) and says that in that case Baron Parke did not consider it an invariable rule that a statute should not be retrospective unless so expressed in the very terms of the section which had to be construed, and said that the question in each case was whether the Legislature had sufficiently expressed an intention. In fact (says Lord Hatherley) we must look to the general scope and purview of the statute and at the remedy sought to be applied, and consider what was the former state of the law and what it was that the Legislature contemplated. "I think" (he says) "that there is a considerable difference between this case and a case where a right of action is actually taken away. That is the ground of the decision in *Moon* v. *Durden*(5) and *Jackson* v. *Woolley*.(6) In each of those cases the persons had acquired by positive act *inter partes* a right of action, in the latter case by a co-contractor having made a promise, which, of course, the person had a right to rely upon, as the law then stood,

(1) 4 H. & N. 559.
(2) L. R. 4 Ch., App. 735.
(3) 8 Ell. & Bl. 429.
(4) 2 Exch. 23.
(5) 2 Exch. 22.
(6) 8 Ell. & Bl. 778.

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as giving him a further period of six years for his remedy." I own that it appears to me that, to adopt the construction contended for by Mr. Inverarity in behalf of Trikamdás Shivrám, the execution-creditor, would be to do little else than to hold that the various eminent legislators through whose hands the new Code passed during its preparation, and whilst in progress through the Legislative Council of India, had forgotten altogether to consider the case of the very large number of judgment-debtors who would be imprisoned in the gaols of the presidency towns and throughout the rest of British India on the 30th September 1877. By adopting the interpretation which I have followed, effect is given to what I think the Legislature not only contemplated, but in positive and unambiguous terms enacted, when it passed the 341st and 342nd sections, and thereby said that "the judgment-debtor shall be discharged from jail when the term of his imprisonment, as limited by section 342, is fulfilled," and that "no person shall be imprisoned in execution of a decree for a longer period than six months."

When of two possible constructions, one is in strict harmony with the improvements contained in the Act, and is not merely not inconsistent with the plain grammatical language used in three of its sections (sections 3,341, and 342), but follows the provisions and directions therein contained, as well as the benign spirit of modern legislation on the subject of imprisonment for debt, as exemplified in the English Statute 32 and 33 Vic., c. 62, section 7, and, moreover, prevents a grave injustice being inflicted upon the civil prisoners already in custody throughout British India when the Act came into operation; whilst the other construction treats the point under consideration as not having been considered by the Legislature at all, and in effect attributes to the Legislative Department and the Legislative Council of the Governor-General what appears to be little short of crass negligence, I confess that I, for one, gladly adopt the former construction, based as it is upon a well-known canon applicable to the interpretation of statutes, and which was adopted in 1866 by Sir Richard Couch, when Chief Justice of this Court (a Judge of remarkable accuracy and acumen), in the case I have already referred to.[1]

(1) 3 Bom. H. C. Rep., O. C. J. 49.

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Being, therefore, for the above reasons, clearly of opinion that the petitioner Ratansi Kaliánji has been since the 1st October instant, and is now, illegally detained in prison, I think he ought to be immediately discharged from custody.

GREEN, J.:—It is contended on behalf of the petitioners here that sections 1, 3, 341, and 342 of the new Civil Procedure Code operated to effect, as on the 1st October instant, a legislative general gaol delivery throughout British India of all civil prisoners in custody under process issued by virtue of the Acts repealed by section 3 of the new Code, in cases where such prisoners had on the said 1st October been in custody for six months or upwards. The Legislature may or may not have had the intention that such general liberation of civil prisoners should take place; the question is, has such intention been manifested? and it is, in my opinion, *primâ facie* very improbable that the Legislature should have left such intention, if it existed, to be collected from inference, and should not have enacted an express provision embodying such intention. However this may be, such intention, though to be collected from inference only, must, of course, if manifested, have its effect. By section 1 of the new Code it is enacted that it shall come into operation on the 1st day of October 1877. By section 3 is repealed (amongst other Acts) so much of Act VIII of 1859 and Act XXIII of 1861 as had not already been repealed; but it is provided that "nothing herein" (by which I understand nothing in section 3) "contained shall affect the procedure prior to decree in any suit instituted or appeal presented before this Code comes into force." Apart from section 1 and the proviso to section 3, I do not find in the new Code any provision as to its operation with regard to pending or past proceedings. Section 1 in itself merely says that the Code shall be in force from the 1st October 1877, and does not in any way affect past proceedings or their effect, and the repeal of the previously existing procedure Acts (under which, of course, any such past proceedings were taken) contained in section 3 is coupled with the proviso that such repeal is not to affect proceedings prior to decree in suits or appeals already instituted or presented on the 1st October 1877. The question raised here really is

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whether section 1, and the repeal of Act VIII of 1859 and Act XXIII of 1861 by section 3, are to be held to alter or abridge the legal effect, after the 1st October 1877, of proceedings had and finally determined under such repealed Acts before the new Code of procedure came into operation. It is quite clear, in my opinion, that section 1 cannot be held to do so, and that the question is, whether any such intention of the Legislature can be inferred from section 3 with its proviso? The question raised is one of great importance, affecting not merely the greater or less maximum length of the custody of all civil prisoners commited under the repealed Acts before the 1st October 1877, but, in many important respects, the validity and effect of executions and other proceedings posterior to decree ordered prior to the 1st October 1877 under the then existing legislation.

In construing the New Civil Procedure Code, as all other Acts of the Legislative Council of India coming into operation subsequently to the 3rd January 1868, we must always have regard to Act I of 1868, "the General Clauses Act, 1868," which contains, besides a clause interpreting certain terms and phrases of ordinary occurrence in Indian legislation, certain rules of construction to be applied to Acts of the Legislative Council coming into operation subsequently to the 3rd January 1868. By section 6 of this Act it is enacted as follows :—"The repeal of any statute, Act or regulation shall not affect any thing done, or any offence committed, or any fine or penalty incurred, or *any proceedings commenced*, before the repealing Act shall have come into operation." The words "proceedings commenced" in this section have received a judicial interpretation by this Court sitting as an Appellate Court of four Judges in the case of *Ratanchand Shrichand* v. *Hanmantrav Shivbakas*.[1] It was there held that the right of appeal to the District Court from a decree made before Act XIV of 1869, "The Bombay Civil Courts Act, 1869," came into operation, by a Principal Sadar Amin, was not taken away by that Act, though the amount or value of the subject-matter exceeded Rs. 5,000. By section 26 of that Act it was enacted that in all suits decided by a Subordinate Judge of the first class, in the exercise of the jurisdiction therein mentioned, (and by section 30 the then present Principal Sadar

(1) 6 Bom. H. C. Rep. A. C. J. 166.

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Amíns were constituted the first Subordinate Judges of the first class) the appeal from his decision should, when the amount or value of the subject-matter exceeded Rs. 5,000, be direct to the High Court. It was held by the Court that the repeal, by the Act, of the laws and regulations under which there was a right of appeal in such a case in the first instance to the District Court, did not take away such right of intermediate appeal, and that such right was saved, notwithstanding such repeal, by reason of the operation of section 6 of the General Clauses Act, which I have already set out. This decision was in no wise inconsistent with the earlier one of *Framji Bomanji* v. *Hormasji Barjorji*,[1] where it was held that a right of appeal to the High Court itself (*i.e.*, to three or more of its Judges) from the decree of two of its Judges, in a suit heard and decided before, though the decree was sealed after, the Amended Letters of December 1865 came into force, (and which right of appeal existed under the former Letters Patent of June 1862) was taken away by the coming into operation of the amended Letters Patent. In that case, of course, no resort could be had to the General Clauses Act, as it was not then passed. It may further be observed that the General Clauses Act applies only to Acts of the Governor-General's Legislative Council, and not to Royal Charters or Acts of Parliament. The decision in *Framji Bomanji* v. *Hormasji Barjorji*[2] was founded on the express words of the amended Letters Patent taking away such intermediate appeal to the High Court itself, by making the appeal from two Judges who agreed direct to the Privy Council, and providing further "that all proceedings commenced in the said High Court prior to the date of the publication of the Letters Patent (*i.e.*, the amended ones) shall be continued and depend in the said High Court as if they had *commenced* in the said High Court after the date of such publication."

It is, I think, much to be regretted that no such clause as the one last cited, or as section 387 of Act VIII of 1859, was introduced in the new Code of Civil Procedure, clearly defining in a positive, and not merely in a negative, way what is to be its operation on proceedings already commenced. However this may be, in the case

(1) 3 Bom. H. C. Rep. O. C. J. 49. (2) 3 Bom. H. C. Rep. O. C. J. 49.

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referred to, of *Ratanchand Shrichand* v. *Hanmantrav Shivbakas*,[1] it was held that the words "proceedings commenced" in section 6 of the General Clauses Act included a suit in which a decree had been given, and that the word "proceedings" must be taken to include all the proceedings in the suit from the date of its institution to its final disposal.

But for the proviso to section 3 of the new Code, and having regard to the judicial interpretation which the words "proceedings commenced" in section 6 of the General Clauses Act, 1868, have, as aforesaid, received, and to the absence of any provision (unless section 1 can be considered such) in the new Code expressly applying its provisions to pending proceedings, I should have been disposed to hold that, as to all proceedings (*i.e.*, suits, applications, and matters of civil nature), commenced and pending in this Court on the 1st October 1877, their subsequent conduct and course (including execution and appeal) would be governed by the law theretofore in force, though the repeal of such law would be immediate as to proceedings not then commenced, and to such last-mentioned proceedings the new Code would apply. But, of course, the general rule of construction contained in section 6 of the General Clauses Act must yield to the intention of the Legislature expressed in any subsequent Act, that to a greater or less extent that rule is not to apply to such subsequent Act; and I am of opinion that in the proviso to section 3 of the new Code coupled with section 1 is to be gathered the intention of the Legislature that, to a certain extent at least, such rule was not to apply so far as concerned the repeal of the previous procedure laws effected by section 3. The frame and wording of this proviso appear to me sufficiently clearly to manifest the intention of the Legislature that the repeal of the old Procedure Acts, and in particular Acts VIII of 1859 and XXIII of 1861, *was* to affect to some extent the procedure (other than procedure prior to decree) in suits instituted or appeals presented before the Code came into force, and in the way that in respect to procedure not prior to decree the provisions of the new Code were to take the place of the previously existing law. But ample effect, in my opinion, would be given to the proviso and to such intention, while at the same

[1] 6 Bom. H. C. Rep. 166 A. C. J.

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time regard would still be had to section 6 of the General Clauses Act, by holding that in all *future* (*i.e.*, future with reference to the 1st October 1877) steps and proceedings not being prior to decree in suits instituted and appeals presented before the 1st October 1877, the provisions of the new Code are to be observed and operative. I cannot understand on what principle the Legislature can be supposed to have intended in any way to disturb acts or proceedings in suits already done and had, or the legal effect and operation which acts or proceedings already done and had would have had at the time they were so done and had.

A number of English authorities were cited to show that statutes concerned with judicial procedure, where of themselves they are capable of applying to pending proceedings, are an exception to the general rule of construction of statutes, that they are not to be deemed to have a retroactive operation ; or, in other words, that statutes concerned with judicial procedure do, in a certain sense, and unless such operation be excluded, affect judicial proceedings pending at the time such statutes came into force. But these authorities all deal with the question whether, where some new step is taken in the course of pending proceedings after the new statute came into operation, and on which new step being taken, the new statute has imposed some restraint, or conferred some benefit, on one or other party to the proceeding such restraint or benefit is not to have effect, and this for the reason that the action, suit, or proceeding itself, as a whole, had originated before the new statute came into operation.

In *Freeman* v. *Moyes*[1] an action was commenced by the plaintiffs as executors in Easter term, 1832. On the 14th August 1833 came into operation 3 and 4 Wil. IV, c. 42, which *inter alia* enacted that executors and administrators bringing actions should be liable in their personal capacity to costs in case of nonsuit or verdict passing against the plaintiff. The action was tried at the sittings of the Michaelmas term, 1833, and so after the statute had come into operation, and the defendant having a verdict, it was held he was entitled to costs under the statute against the plaintiffs personally. This, then, was a case of a certain effect being given by a statute

(1) 1 A. & E. 338.

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to a certain event, namely, a verdict for the defendant, in the course of a suit pending when the statute came into force, which event occurred after the statute came into operation. *Wright* v. *Hale*[1] again (which is a very strong case, and, though followed, was not quite approved of by the Queen's Bench in *Kimbray* v. *Draper*[2]) was a case of a statutory provision coming into operation between the commencement and the trial of an action. It was provided by 23 and 24 Vic., c. 126, section 34, that when a plaintiff in any action in any of the superior Courts for an alleged wrong recovers by the verdict of a jury less than £5 damages, he shall not be entitled to any costs if the Judge certifies to deprive him of them, and the question for the Court was whether the Judge trying the cause had power to give such a certificate with effect having regard to the circumstance that the suit had been commenced when the statute in question came into operation. Here, again, it was a question of a certain disadvantage being imposed on a plaintiff, but as a result of a step in the suit which took place *after* not *before* the statute came into operation. The same observation applies to *Kimbray* v. *Draper*[3] already cited. So, again, in *ex parte Anderson*[4] it was held that the jurisdiction given by the Bankruptcy Act of 1869 to grant an injunction to restrain a person not a party to the bankruptcy proceedings from dealing with property alleged to have been fraudulently assigned before the bankruptcy, might be exercised in the course of the proceedings in a bankruptcy which had commenced before the Act. Then, in the case of *Attorney-General* v. *Sillem*,[5] the question was whether an appeal to the Exchequer Chamber from the decision of the Court of Exchequer, on a motion for a new trial of an information by the Attorney-General on the Revenue side, in a case where the verdict of the jury had been given at a trial had at the sittings after Trinity term, 1863, could be given by virtue of a general rule or order as to practice made by the Lord Chief Baron and Barons on the 4th November 1863, and expressed to be in pursuance of section 26 of the Statute 22 and 23 Vic., c. 21. The majority of the Lords who

(1) 6 H. & N. 227.
(2) L. R. 3 Q. B. 160.
(3) L. R. 3 Q. B. 160.
(4) L. R. 5 Ch. App. 473.
(5) 10 H. L. C. 704.

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heard the appeal were of opinion that the rule itself, giving the right to appeal in such a case, was not valid, as being a rule which the Barons had not under the statute power to make. But the opinion of all the Lords, who expressed any on the point, seems to have been that if the rule had been valid in itself, it would not have been an objection to it that it would affect a pending suit. But it must be borne in mind that the circumstances which the Lords, who so expressed an opinion, had before them were a verdict after Trinity term, 1863, a motion for a new trial mentioned but postponed on the 3rd November 1863, a new rule of the Exchequer Court of the 4th November 1863, giving an appeal to the Exchequer Chamber from a decision on such motion, the motion renewed, and a rule for a new trial granted, on the 5th November 1863, and the rule finally discharged in January 1864. There are certain propositions laid down by Lord Wensleydale, in moving the judgment of the house, which are material to be noticed for their bearing on the question of the construction of statutes concerning procedure. After referring to the principle that statutes are not to be construed retrospectively so as to deprive any person of a vested right of action, he notices the difference which exists between such a case and the case where a statute is dealing with new procedure to recover such right, which, the learned Lord says, "it may be quite reasonable to regulate and alter." He proceeds: "The right of the suitor is to bring the action and to have it conducted in the way and according to the practice of the Court in which he brings it; and if any Act of Parliament, or any rule founded on the authority of the Act of Parliament, alters the mode of procedure, then he has a right to have it conducted in that altered mode. That, therefore, takes away nothing. The right of action does not constitute a title to keep all the consequences of the right as they were before. It gives the right to have the action conducted according to the rules then in force with respect to procedure." But neither in this case of the *Attorney-General* v. *Sillem*,[1] nor in any of the cases cited, is anything to be found involving this, that a statute concerned with judicial procedure,

(1) 10 H. L. 704.

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though affecting pending suits as to all future proceedings in such suits, interferes with or affects steps and proceedings already, at the time such statute came into operation, taken and determined. In fact, in *Wright* v. *Hale*,(1) (which decision, though, as I think, disapproved of in *Kimbray* v. *Draper*,(2) seems to be approved of by Lord Wensleydale), the Chief Baron denied that by its decision the Court was giving any retrospective operation at all to the statute then in question, and that for the reason that the decision only gave the effect provided by the statute to be given to an act to be done at the trial, which was *after* the passing of the statute. So Wilde, B., when in the same case he states the principle thus :—"The right of the suitor is to bring an action and have it conducted according to the practice of the Court. Pending the action the procedure may be varied, but his right is to have his action conducted according to the existing course of procedure, whatever that may be," is evidently referring to proceedings to be taken after the statute introducing change of procedure comes into operation, and there is nothing in his judgment to indicate that he considered that the effect of a proceeding already had and concluded would be altered by a statute annexing greater or less effect to a similar proceeding taken subsequently to the statute. The case of *Wright* v. *Hale*(3) would have been in point for the present petitioners had the verdict been before the statute came into operation, but the certificate of the Judge depriving the plaintiff of costs had taken place after it.

Being of opinion, therefore, that the generality of the words in section 6 of the General Clauses Act is to be limited by the effect of the proviso to section 3 of the New Procedure Code to this extent, that the repeal of the old Procedure Acts does affect suits commenced before the 1st October 1877 so far as concerns proceedings (not prior to decree) in such suits to be taken subsequently to that date, and that by virtue of section 1 combined with the inference to be drawn from this proviso, the procedure to be applied to such subsequent proceedings are the provisions of the new Code (except with regard to procedure prior to decree), I think

(1) 6 H. & N. 227. (2) L. R. 3 Q. B. 160.

(3) 6 H. & N. 227.

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that for the execution of decrees in suits commenced before that date, and whether such decrees themselves be of a date prior or posterior to the same date, the parties can, after the said 1st October 1877, resort only to the provisions of the new Code, and that, for instance, under any warrant of arrest ordered to issue subsequently to that date, whether in execution of a decree prior or subsequent to the same date, the judgment-debtor cannot be imprisoned for a period longer than six months. But the present petitioners were on the 1st October 1877 already in custody under warrants issued by virtue of Act VIII of 1859, by the terms of which they were to be imprisoned till satisfaction of the decrees against them. Their period of imprisonment was limited by the said Act to two years. No new proceeding has been taken, or is, in fact, necessary to be taken, to detain these persons in custody under the warrants already issued, and, in my opinion, the right which the execution-creditors had, under such warrants, to detain their debtors in custody till satisfaction of their decrees (but not exceeding the period of two years) was in no wise affected by the Code coming into operation. As to proceedings already had and taken in suits, the old Acts are not, in my opinion, repealed. The right of detaining creditors till satisfaction, is further, in my opinion, a right having relation to property, and tending at least (whether effectively and certainly or not, is not material) to secure payment to creditors of money due to them. It was a right, whether in fact valuable or not, vested in the creditor at the time the new Code came into force, and, as such vested right, is not to be taken away except by the clearly expressed will of the Legislature. Ample application is, in my opinion, to be found for sections 1, 3, 341 and 342 of the new Code without attributing to them any such effect, and in such case comes into operation the general principle that, unless absolutely imperative, statutes are not to be construed to take away or diminish existing rights. I think the case of *Williams* v. *Smith*,[1] which was cited in the argument, is very much in point. Though, no doubt, the statute in question there, namely, "The Mercantile Law Amendment Act, 1856," was not a statute generally concerned with procedure, yet the particular provisions in question, which altered the effect of a writ of *fi. fa.* was distinctly so.

(1) 4 H. & N. 559.

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Though the words of the statute there in question were in themselves such as affected the operation of writs of *fi. fa.* already delivered to the sheriff, but not executed by actual seizure and attachment of goods, yet it was held that such words were not to have retrospective operation as to such writs, so as to deprive an execution-creditor of the right or advantage he had already gained when the statute came into operation, by the fact of the writ in the particular case having been already delivered to the sheriff at the time the statute came into force, though the seizure and attachment had not at that time taken place. For the above reasons I am of opinion that the application for the release from custody of the petitioners must be rejected.

WEST, J.:—The question for disposal in the present case being that of the proper scope of section 342 of the Code of Civil Procedure, Act X of 1877, the argument for the applicants, Ratansi Kaliánji and others, is that their detention is a continued act of procedure in execution of the decrees against them, that procedure in execution, even as to past decrees and on past warrants of execution, is to be governed by the new Code, and that, therefore, section 342, as it relates to procedure in execution, properly applies to their cases. That section declares that "no person shall be imprisoned in execution of a decree for a longer period than six months:" the petitioners having already been imprisoned for more than six months, pray that an order may be made for their release. That the orders for their imprisonment were properly made under Act VIII of 1859 is not questioned, nor is it disputed that, according to that Act, the imprisonment might extend to two years, while the petitioners have been imprisoned for a much shorter time; but the original capacity of the orders to warrant an imprisonment of two years has, it is said, been cut down by the new law, so that it must now, after the lapse of more than six months, be regarded as exhausted.

The proposed construction is so far retrospective that it would give to the orders formerly made in the cases of the applicants an effect different and more limited than that attached to them by the law as it stood when the orders were pronounced. But Lord Westbury has laid down that there is a broad distinction

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between the rules which give a right of action and those which regulate the procedure of the Courts—*Attorney General* v. *Sillem*; (1) and laws of procedure, it is argued, are in the required sense ordinarily retrospective. Every hour's constraint being a renewed exercise of coercion, though in effect continuous with the force exercised before, is a fresh step in giving physical operation to the Court's order. It is, moreover, not to be regarded as the exercise of a right vested in the judgment-creditor, but merely as a process employed by the Court and its officers whereby the creditor may, if possible, attain his right, which is to have his decree satisfied by payment. Each new step, though the suit or the execution may have commenced before the new law was passed, is governed by it in the absence of an express provision to the contrary; and in the present instance the saving of the old procedure in the case of pending suits and appeals gives special significance to the omission of any like provision as to the proceedings in execution of decrees.

The general principle of the non-retroactivity of new laws need not be insisted on.(2) On the other hand, there is, in one sense, an element of retroactivity in all laws, since no law can operate except by changing or controlling what would else have been different capabilities, or a different sequence of acts and events having their roots and motives in the past. It would be more important for practical purposes to distinguish, if possible, the cases and the senses in which the loosely-expressed principle does and does not apply, and to ascertain the exceptions to which it is subject. That, as has occasionally been argued, there is something universally and essentially wrong and unjust in retrospective laws is not to be admitted. The principle has, indeed, been accepted as a fundamental one in the written constitutions of some states, but it is properly rejected by Willes, J., in the case of *Phillips* v. *Eyre*,(3) and by Dr. Lushington in the "*Ironsides*."(4) For the legislator the question is always one of the higher as against the lower, or of the general against the particular interest. For the judge the question is simply as to the true intention of

(1) 10 H. L. 704; also see Savigny System v., 5 s., 204 ss.
(2) See Lord Coke on the St. of Gloster, 2 Inst. 292. Cic. in Verr, Act II, Lib. I, Cap. 42.
(3) L. R. 6 Q. B. at p. 23. (4) 29 L. J. Adm. at p. 131.

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the Legislature (see *per* Trevor, C.J., in *Arthur* v. *Bokenham*[1]). In the case of the *Queen* v. *Vine*[2] the statute to be construed said nothing expressly as to existing holders of licenses, and the rule against retroactivity would have saved an interest already fully acquired and exercised; but the majority of the Court, looking to the obvious purpose of the Legislature, held that a past conviction caused the law to operate in destroying an existing interest in a public-house license, as well as in preventing the acquisition of such an interest in future.

This retroactive force, however, bearing usually on whole classes of the community, which has in particular instances to be ascribed to laws intended to abolish or profoundly change some legal institution, or to attain some great public end, even at the sacrifice of individual interests, has always to encounter a very strong presumption if it is sought to apply it to the extinguishment or the extension of particular rights once definitely constituted between individual subjects of the state.* These cannot be interfered with, except at the cost of a general distrust of the stability of the law and an unjust preference of one to the other of the two parties to transactions. Such transactions are, for the most part, purely voluntary, and the law will give effect to them because it has virtually promised to do so; though, as to the method and details, in the manner deemed most convenient. Hence in *Moon* v. *Durden*[3] the majority of the Court held that a right of action fully acquired before the passing of the Wagers' Act was not extinguished by the words "no action shall be brought or maintained" on a wager. The public interest was manifestly the motive of the law; yet, as between private parties, it was not allowed to affect the consequences of acts not, at the time they were entered on, forbidden, and capable in themselves at the time of generating a legal right and corresponding obligation. The cases of *Gilmore* v. *Executors of Shuter*,[4] of *ex parte Rashleigh*,[5] and many others, are to be referred to the same principle. Language wide enough in itself to embrace the results of past transactions has been restricted to transactions concluded after the enactment of

(1) 11 Mod. at. p 161. (2) L. R. 10 Q. B. 195.

* Mis S. A. 38 of 1871.

(3) 2 Ex. R. 22. So *per* Jessel M.R. *In re Suche and Co.*, L. R. 1 C. D. at p. 50.

(4) 2 Mod. 310. (5) L. R. 20 Eq. Ca. 782.

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the law, in order to avert its preventing the full exercise and natural fruition of rights already fully acquired by one subject as against another before the new rule had become law.

That a legal relation, however, between the parties concerned is equally constituted by a judicial order as by their own agreement, needs no demonstration. It is only through the possibility of judicial enforcement that the agreement itself becomes practically binding. The judicial transaction, therefore, consisting in an inquiry and an order of a Court under a particular law, is a matter as to which that law, though repealed, still has full effect. The decision has ascertained or created a legal right [1] which must afterwards be guarded in the unfolding and outgrowth of all its regular consequences. If this were not so, indeed, the right and the relation must wholly fail with the statute under which they came into being, and prisoners confined even for a week under the late Code, for instance, might demand their release for want of authority for their detention. That Code, it seems, must have clothed the Court's orders with an abiding validity, the judgment-creditors with an abiding right, or else with none at all.

In the present case it is urged for the judgment-creditor that he has acquired a right of this kind. Before the passing of the new Code, it is said, he had a right arising from a specific order to enforce payment of the debt due to him by keeping his judgment-debtor, if necessary, for two years in gaol. The detention of the debtor, resting in the option of the creditor, was a matter of substantial right, though of right to be exercised only in the appointed way; and the presumption, it is contended, is strong against any intention to deprive him of this right: he is not to be deprived of it by a mere inference from the omission to provide for this particular case, without words expressly applicable to it. In the case of *Williams* v. *Smith* [2] the delivery of a writ of *fi. fa.* to the sheriff was held to bind the goods of a judgment-debtor after the passing of the Mercantile Law Amendment Act, it having been delivered before the Act came into force, which made actual prior seizure necessary to produce this effect as against a purchaser in good faith for valuable consideration.

[1] See per Lord Selborne in *Lockyer* v. *Ferriman*, L. R. 2 App at p. 519.
[2] 28 L. J. Ex. 286.

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The case just referred to was analogous to the one before us, in that a right acquired in relation to a judgment-debtor's property was held not to have been impaired by a law which, if the right had to be newly acquired, would have prevented that result from arising. If the creditor's right (for some right he clearly has) against his judgment-debtor's person is of a like legal character to that which he acquires against his property by a proceeding which binds it, the new law which modifies the right ought to be applied only to instances arising after its own creation in the one case as in the other. The cases certainly resemble one another in this, that in *Williams* v. *Smith*(1) a right had been acquired by the judgment-creditor to which full effect was to be given by a merely ministerial activity, just as the imprisonment of the applicants here is to be carried out without further order of the Court by the sheriff.

The coercion exercised in depriving a man of his property and keeping him out of possession of it seems, from this point of view, quite akin to that used in confining his person. The extension and the restriction of the natural personal capacity involve in each case the creation of a right regulated in each case by special rules for its exercise.(2) That some further result is expected or intended to be realized is no special attribute of the particular right consisting in creditor's power in execution; but such as it is it belongs equally to either mode of coercion. If, too, the one is a continuous act of procedure so it appears must be the other. Under the new Code the wages of domestic servants are not liable to attachment (section 266). If wages were attached on the 30th September 1877, did the attachment fail or become illegal on the 1st October? There would be a continuous procedure in the sense intended, so that, if that sense be admitted, the new Code would dissolve the attachment; but *Williams* v. *Smith* (3) shows that in spite of this the creditor's right fully acquired would not be annulled. It appears, then, that the ministerial officer is to act on the order of the Court according to its original purport, and the jurisdiction under which

(1) 28 L. J. Ex. 286.

(2) Ortolan Elem. de Dr : Pen : S. 12. Goudsmidt Pand. S. 17.

(3) 28 L. J. Ex. 286.

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it was issued; that the order itself, in the absence of any express provision to the contrary, retains its validity until it is withdrawn or varied, and that the new procedure, therefore, does not apply, except perhaps in matters of mere administration,[1] or provisional arrangement,[2] whether as touching a person or property. It cannot, at any rate, apply so as to annul an order properly made, a relation legally constituted, and thus deprive the creditor of his right once acquired by the arrest of his judgment-debtor in execution. In the words of Coleridge, J., in *Reg.* v. *Denton*,[3] "what has been perfected is not to be disturbed," though, "if we require the Act for any further step, it must be in force at the time." Any change in the relations of the parties can be made only in accordance with the later and existing law; but their previously subsisting relations continue to subsist as before.

But even if that were otherwise, it does not, judging by the generally received standards of judicial construction, seem likely that the Legislature intended the limiting provision of section 342 of the new Code to be applied to cases of imprisonment other than those arising under the Code itself. Sections 254, 259, 260 of the Code empower the Court to direct the imprisonment of a defaulting judgment-debtor. If section 342 were annexed immediately to any of these sections, no reasonable doubt could exist that it was intended as a proviso or limitation operating along with the affirmative enactment, and on those cases only to which the empowering enactment was to be applied. As a simply negative provision, it would by itself have no effect; this forces us to look for some affirmative provisions with which it may be read; and these we find within the same chapter of the Code. The sections giving authority could, of course, be applied only to cases arising after the Act had come into force; and thus the limiting provision would itself be limited. Then, as to the form of expression, "No person shall be imprisoned" appears more properly to mean "No one shall be put into prison and kept there" than "No one being now in gaol shall be kept there." The latter, as an additional or complementary sense, would naturally have been conveyed by say-

(1) See *Reg.* v. *Mount*, L. R. 6 P. C. 283.
(2) See *Ex parte Anderson*, L. R. 5 Ch. Ap. 473.
(3) 21 L. J. M. C. at p. 208.

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ing : "No one shall be imprisoned or retained in imprisonment," and the omission of an obviously appropriate expression may, according to the argument for the applicants, signify most strongly that the thought was absent too. Still, however, standing, as it does, apart from the affirmative provisions, section 342 may allowably suggest, if looked at singly, the notion of a general prohibition of all imprisoment in civil cases beyond a term of six months, though more properly referrible to imprisonment begun, continued, and ended in future ; but then it is a cardinal rule, in the interpretation of statutes, that every part is to be construed by reference to every other. Section 342 is not only in the same statute, but in the same chapter as the several sections empowering the civil Courts to order imprisonment ; and though there are many intervening sections, they all have reference to the same subject ; the same course of thought is pursued throughout them. The section which restricts imprisonment belongs essentially in sense to the sections which authorize it, and a reason for their severance in place is apparent in the economy of using a single formula of restriction instead of several times repeating it, and in the desire to group the provision fixing the extreme limit of imprisonment along with the provisions in section 341 for the release of the judgment-debtor after a shorter time under the various circumstances there specified.

In the English Statute (32 and 33 Vic., cap. 62,) for abolishing imprisonment for debt, except in cases of fraud and contumacy, an express provision was thought necessary, in order to make it applicable to the case of persons already in confinement. This was an interference with the rights of judgment-creditors as they had already been constituted by a completed juridical transaction which it was felt the Courts would not ground, as to past commitments, on any mere inference from the general abolition of imprisonment. In the present case, if the Procedure Code, while making other provisions for the enforcement of decrees, had enacted that imprisonment for debt should cease, though the application of the law to pending cases would not conform to the rule, laid down by Lord Westbury in *Attorney General* v. *Sillem*,[1]

(1) 10 H. L. C. at p. 727.

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of its applying "equally and impartially to both sides," yet such an abolition of a whole legal institution would perhaps have justified the conclusion that the rights of creditors already acquired over the person of the debtor were meant to be extinguished as well as their future creation prevented. So, if, in the sphere of criminal law, solitary confinement as a punishment were wholly abolished, a reference to the policy or motives of the Legislature would justify without express words a construction against the infliction of solitary confinement for particular crimes committed before the passing of the prohibiting Act. But an Act abolishing whipping as a punishment for petty theft would not make illegal the infliction, after it had passed, of a sentence of whipping pronounced before it. Here the institution of imprisonment for debt, or for failure to satisfy a Court's decree, is by no means abolished; it is only the term to which the imprisonment may extend that is abridged. This is not a fundamental change indicating a completely new view and purpose of the Legislature; it is a mere change of degree, though no doubt a considerable one, within the limits of the institution itself. No special excursive rule of construction, therefore, is to be applied to it; and while it must govern all orders for imprisonment on applications made subsequently to the Code's coming into force, and the execution of those orders, it does not apply to orders made under the former Code.

Had the change in the maximum of imprisonment been from six months to two years, it would hardly have been contended by any one that debtors already in gaol might be detained there under the new Code for eighteen months longer than the old one allowed. Had any creditor been hardy enough to urge such an argument, it would have been answered that his right against his debtor's person had become definitely fixed by his proceeding under the former Code, and that the debtor's position was not to be prejudiced by the operation, not expressly directed, of an *ex post facto* law. That the close of the litigious transaction, like that of a contractual one, fixes the rights of the parties according to the then existing law, is evident from *Mount* v. *Taylor*[1] and *Butcher* v. *Henderson*.[2] In the one case the change of

(1) L. R. 3 C. P. 645. (2) L. R. 3 Q. B. 335.

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the law operated favourably, in the other adversely, to the defendant as to the plaintiff's recovery of costs; and in principle there is no distinction between a construction prejudicial to the debtor and a construction prejudicial to the creditor. The latter is no more to be deprived of a right of confinement of his defaulting debtor than the latter of the limitation, subject to which the right came into existence, and was first exercised. Our sensibilities are apt to influence our judgment in a matter of this kind, but the question is really one simply of defined civil rights as affected by subsequent legislation. Even a milder penal law, however, is never held to relieve against sentences already passed under the severer provisions of its predecessor, and in the French and German codes it has been thought necessary to provide expressly that offences committed under the more rigorous law shall, if tried after a more lenient one has passed, be punished according to the milder standard. Mere construction would not have given the new laws any such reflexive effect, though in England and in India the result has been held to follow from a change of the law that a criminal is not liable to punishment at all.

The provisions in juxtaposition to which section 342 is placed like the other provisions of the chapter of the Code on execution seem to point only to future steps taken under future orders of the civil Courts. Looking at the chapter as a whole, it seems plain that the provisions empowering the Courts to order imprisonment being necessarily intended for the future, the limiting provision which in sense accompanies them is intended to apply, like the several ancillary and model provisions which intervene, to future cases also, and to those cases only. Such a construction will give full effect to every word in the section, and it is surely very unlikely that the proposed extension of its meaning should in so elaborate an Act have been left to a mere questionable implication when the addition of three words would have made the more comprehensive intention clear. It seems safest to ascribe to our Legislature an excess rather than a defect of system and fo technical reserve; and this leads directly to some considerations which, in my opinion, are quite decisive of the case before us.

Section 6 of Act I of 1868 says that "The repeal of any..... Act ..... shall not affect ..... any proceedings commenced

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before the repealing Act shall have come into operation." If there were no provision at all in the new Code as to any matters still pending, this provision would, in my opinion, prevent the imprisonment of the applicant, as a "proceeding commenced," from being affected by its rules; and I do not think the mere omission of procedure in execution from the enumeration in section 3 of matters not to be governed by the Code affords a safe basis on which to ground an exception from the operation of the General Clauses Act. The provisions of that Act we must suppose are ever present to the memories of our law-makers, and the omission of any provision which that Act supplies, is an exact fulfilment of its purpose. It may well be that the clause, directing that the whole procedure prior to decree in pending suits is to be governed by the former law, was introduced into the Code on account of a possible distinction arising on the words "proceedings commenced," and with a view to secure the harmony of a single system amongst the several steps of the same suit; while as to execution it was thought that only "proceedings commenced," some definite application for the enforcement of a decree, or some particular prayer against the attachment of property, and the steps consequent on it, required a substantial identity of procedure. This as to anything initiated before the 1st October 1877 was sufficiently provided for by the General Clauses Act; matters originated afterwards were left to the operation of the Code. In the cases before us it is certain that the "proceedings commenced" before the 1st October. What is urged, is that they ought to have ended on that day; but if the General Clauses Act operates at all, it causes the former and not the present Code to govern the enforcement or attempt to enforce the judgment-creditor's decree throughout the proceedings consequent on his application for the debtor's imprisonment. Under the former Code the applicants are not entitled to be released, and their applications should be rejected. The application itself may, indeed, from one point of view, be regarded as a "proceeding commenced" since the new law came into operation, and the new law would thus govern the procedure under which it was to be heard and disposed of; but if it is a new proceeding in this sense, and with these consequences, that circumstance excludes it from being integra

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with the previous proceedings in execution. The fact, therefore, that it must be dealt with under the new law, has no influence on them as regards the law to which they are subject. If, on the other hand, it is to be regarded as integral with the previous applications and orders, forming with them a single and essentially connected series, then it must necessarily be part of a "proceeding commenced" before the new Act came into force, and not governed, therefore, by its provisions. In neither case can it bring within those provisions orders deriving their validity and effect from another law.

[APPELLATE CIVIL.]

Before Sir M. R. Westropp, Kt., Chief Justice, and Mr. Justice Melvill.

August 22.

MANOHAR GANESH (ORIGINAL PLAINTIFF), APPELLANT, *v.* BÁWÁ RÁMCHARANDÁS AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Court fees—Act VII of 1870—Declaratory decree—Consequential relief—Valuation of suit—Jurisdiction—Appeal.

Held, following *Náráyán Madhavráv* v. *Collector of Thána* (I. L. R., 2 Bom., 145), that the decision of the Court of first instance rejecting a plaint for in sufficiency of the valuation and stamp for the purposes of the Court-fees' Act (VII of 1870), not being to the detriment of the revenue, is final, and no appeal lies from it.

A suit praying merely for a declaration that the plaintiff is entitled to require the defendants to account to him, and to permit him to inspect their books is simply a suit for a declaratory decree without consequential relief, and falls within art. 17, cl. iii. of sched. II of Act VII of 1870.

A suit praying for such a declaration as the above, and also for a positive order in the nature of a mandatory injunction for the production of the defendants' books and property in their hands, or a suit praying for such declaration as the above, and also for a positive decree for an account to be taken by the Court, and for the production of the books and property would range under sec. 7, cl. IV, art. (*c*) of Act VII of 1870, as being a suit "to obtain a declaratory decree or order where consequential relief is prayed," and also within art. (*d*) of the same section, as being a suit "to obtain an injunction," and a suit of the third species described above would fall under art. (*f*) of the same clause, as being a suit "for accounts"

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Quære whether, in the case of a suit for a declaration of the right of the plaintiff to an account and to inspection of the defendants' books and for a mandatory injuction for the production of those books, or of a suit for such declaration and for a positive decree for the taking of an account by the Court and the production of the defendants' books, the plaint would, by virtue of sec. 17 of Act VII of 1870, require separate stamps under articles (*d*) and (*f*) of cl. iv, sec. 7, or be sufficiently covered by the stamp under art. (*c*) of the same clause, and whether, assuming the declaration and the account each to require a stamp, the prayer for an injunction or order for the production of books is not merely ancillary to, and not a distinct subject from, the taking of an account.

Quære whether the provision in sec. 7, cl. iv of Act VII of 1870, that the amount of the fee payable in suits falling within that clause shall be computed "according to the amount at which the relief sought is valued in the plaint," is so inconsistent with that portion of sec. 31 of Act VIII of 1859, which permits the Court receiving the plaint to revise the valuation of the claim, as to render that portion of sec. 31 of Act VIII of 1859 inoperative in suits within sec. 7, cl. iv of Act VII of 1870, notwithstanding the concluding passage in that clause.

Quære whether the concluding passage in cl. iv, sec. 7 of Act VII of 1870 is too express to admit of a limitation of the power of the Judge, and leaves him the right to revise the valuation placed on suits under cl. iv by the plaintiff. But, assuming this to be so, it would, generally, not be advisable that the Judge should enhance the valuation on the reception of the plaint.

The fee payable under sec. 7, cl. iv of Act VII of 1870, is according to the amount at which the relief sought is valued in the plaint, and not the value of the subject-matter of the claim.

Quære whether the First Class Subordinate Judge has jurisdiction to try a suit for an account where the plaint states that the property, in the hands of the defendants in respect of which the account is prayed, exceeds Rs. 5,000, but values the claim at Rs. 100.

THIS was an appeal from the decree of the First Class Subordinate Judge of Ahmedabad at Kaira, rejecting the plaint with costs on the ground of the insufficiency of the stamp.

The plaint, which bore a stamp of Rs. 10, valued the claim at Rs. 100, and in substance stated that the defendants, in the capacity of treasurers, received the various offerings, to the extent of several lakhs of rupees, made at the temple of Shri Ranchod Raigi, at Dákor, by the devotees who resorted thither; that the plaintiff, as the hereditary manager and patron of the temple, was entitled to an account, from the defendants, of the offerings made to the idol and received by them, and to inspect their books of account; and that the defendants in August 1872 refused to account to the plaintiff or allow him inspecton of the books and,

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thereupon the cause of action arose. In the commencement of the plaint the plaintiff said: "I sue to take an account (from the defendants) of all the property, whether moveable or immoveable, that has been dedicated or may be dedicated to the idol of Shri Ranchodji Maharaj, which is installed in the Savasthan of Dákor." After stating the facts above mentioned, the relation in which the plaintiff stood to the temple, his right to the account and inspection, and the refusal of the defendants, the plaint proceeded:—"Therefore I have preferred this claim on a stamp of Rs. 10 as provided in the Court-fees' Act, for taking an account of the aforesaid property as follows:—That I may be shown all the property, whether moveable or immoveable, that may have been dedicated from the beginning up to the present day to the aforesaid deity, and that a detailed account may be given to me, from the books kept in respect of the treasury, from the defendants, that an order may be passed declaring that I am entitled in future to inspect and examine the same, and to take such steps as may be necessary with respect to any act of misapplication or misappropriation of such property which I may discover to have been committed during the management of the defendants, and that the costs may be awarded from the defendants."

The defendants, who are called *Shavaks*, by their written statement denied (*inter alia*) their liability to account, in respect of the property mentioned in the plaint, to the plaintiff or anybody else; alleged that they were owners of the property, and had, as against the plaintiff, upwards of thirty years' adverse possession. In the tenth paragraph they said:—"The plaintiff's claim is twofold in nature, namely, for taking the accounts and for a declaration of his right. The same is not made on sufficiently stamped paper. Again, the plaintiff's case as to the management in this suit is of such a nature that the claim should have been preferred on stamped paper of a value proportionate to the property; but as the plaintiff, who has made this claim, valuing the same at Rs. 100, has not mentioned in his plaint the reason of his bringing this suit within the jurisdiction of this Court (First Class Subordinate Judge), the same is beyond the jurisdiction of this Court."

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The First Class Subordinate Judge, after referring to and commenting on the cases of *Ram Doolal Singh* v. *Gopal Kristo Singh* (1) and *Luchmeeput Singh* v. *Nund Coomar*, (2) held that the plaint, in praying for a disclosure of all the property and for a detailed account, in fact asked for consequential relief, and, therefore, did not fall under the provisions of art. 17, cl. iii, of sched. II of Act VII of 1870. He then proceeded to hold that the plaintiff had not the power of placing any valuation he might deem proper on a claim falling under cl. iv of sec. 7 of Act VII of 1870, but ought to value the relief sought so as to represent the pecuniary gain which would accrue to him by the granting of the prayer of his plaint, or the pecuniary loss to which he would be subjected by its being withheld, citing *Ajuas Kooer* v. *Mussamat Luteefa*.(3) The First Class Subordinate Judge, accordingly, on the plaintiff refusing to pay additional stamp duty, rejected the plaint under sec. 31 of Act VIII of 1859, and, lastly, held that, if the claim had been rightly valued at Rs. 100 and sufficiently stamped with a Rs. 10 stamp, then he had no jurisdiction, the property being situate at Dákor, within the jurisdiction of the Second Class Subordinate Judge of Amreth, and the value of the subject-matter of the suit, if taken to be Rs. 100 only, not bringing the case within the special jurisdiction of the First Class Subordinate Judge, under the provisions of section 25 of Act XIV of 1869.

Against this decision the plaintiff appealed to the High Court on the grounds that the Lower Court ought to have held that the plaint was properly valued and stamped, and that the Lower Court ought to have held that the suit was one for a declaratory decree only. The grounds of appeal concluded with a declaration by the appellant, that the value of the subject-matter, relating to which the appellant sought to have his right of taking an account declared, was worth more than Rs. 5,000.

K. T. Telang (*Shántárám Náráyán* with him), for the appellant, cited *Nanhoon Singh* v. *Tofance Singh*, (4) *Jeebraj Singh* v. *Inderjeet Mahtoon*,(5) *Collector of Sylhet* v. *Kali Kumar*, (6) *Mohun Lall*

(1) 16 Calc. W. R. 156 Civ. Rul. (2) 22 Calc. W. R. 388 Civ. Rul.
(3) 18 Calc. W. R. 21 Civ. Rul. (4) 12 Beng. L. R. 113.
(5) 12 Beng. L. R. 115. (6) 7 Beng. L. R. 663.

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Sookul v. *Bebee Doss*, (1) *Rámábái* v. *Trimbák*, (2) *Dallabh* v. *Hope*, (3) and *Nánábhái* v. *Náthábhái*. (4)

Nánábhái Háridás, Government Pleader, for the respondents, relied on *Náráyán Mádhávráv* v. *Collector of Thánd* as showing that the High Court could not entertain the appeal.

WESTROPP, C. J.:—It appears that in the Lower Court the plaintiff's pleader contended that this suit falls, in respect of the Court fees properly payable upon the plaint, within article 17, cl. iii of schedule II of the Court-fees' Act (VII of 1870), as being a suit "to obtain a declaratory decree where no consequential relief is prayed," and therefore, only requiring a stamp of 10 rupees. Such a stamp is more than sufficient for a suit of the value of Rs. 100. The First Class Subordinate Judge, however, decided that the plaint did not come within that article, but rather within section 7, cl. 4, pl. c of the same Act, inasmuch as he was of opinion that the plaintiff not only sought a declaration of his right to take an account of the property and to inspect the '*Shavaks*' (defendants') books, but also consequential relief, namely, production of the property dedicated to the idol, and that an account should be actually furnished to him from the books kept in the *bhándár* (treasury). He also held that the plaintiff was not, under the last-mentioned enactment, at liberty to put an arbitrary value on his claim, but should estimate the relief sought at its actual pecuniary value to himself or to the Hindu devotees of Shri Ranchod Raiji whom he may represent. This, he said, the plantiff had not done in valuing his suit at Rs. 100, it appearing on the face of the plaint itself that he asserted the offerings to be worth several lakhs of rupees. The First Class Subordinate Judge further held that, if the plaintiff (who refused to stamp his plaint more highly) were right in valuing his claim at Rs. 100, he (the First Class Subordinate Judge) had not jurisdiction to entertain the suit, inasmuch as Dákor, where the property to which the suit related is situated, is within the local jurisdiction of the Second Class Subordinate Judge of Amreth, and the claim, being as-

(1) 7 Moore, I. A. 428. (2) 9 Bom. H. C. Rep. 283.
(3) 8 Bom. H. C. Rep. 213 A. C. J. (4) 9 Bom. H. C. Rep. 89, 91.
(5) I. L. R. 2 Bom. 145.

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sumed to be under Rs. 5,000 in value, should have been brought in the Court of the latter in obedience to section 6 of the Civil Procedure Code (VIII of 1859).

The plaint was accordingly rejected with costs.

The plaintiff has appealed to this Court against that decree, alleging that the plaint was properly valued and stamped, and ought not to have been rejected, seeking, as he contends, a declaratory decree merely. In his Memorandum of Appeal he "declares" that "the value of the subject-matter, relating to which he seeks to have his right to taking an account declared in this suit, is worth over Rs. 5,000."

The defendants allege by their counsel here that the decree of the First Class Subordinate Judge is final, and, therefore, that the present appeal will not lie. His decision must, we think, be regarded as resting on the ground that the plaint has not, for the purposes of the Court-fees' Act (VII of 1870), been properly valued and stamped. Viewing his decision in that light, we are of opinion that it was final, and that it is not the proper subject of appeal. So recently as the 14th instant it has been reluctantly held here, in *Náráyán Mádhávráv Náik* v. *The Collector of Thána* [1] that, unless the question of the amount of Court fees properly chargeable on a plaint be wrongly decided, by the Court of First Instance, to the detriment of the revenue, the decision of that Court is final, and, consequently, where that Court has wrongly decided to the detriment of the subject only, but to the advantage of the revenue, there is no appeal—*See* Court-fees' Act (VII of 1870), section 12, cl. 1 and 2. Perhaps the less said as to the equity of such an enactment, the better. A copy of the judgment of this Court in that case shall be forwarded to the Court below. The reasons which constrained this Court so to decide, are fully given there, and need not be repeated here. We must hold that, as the decision of the First Class Subordinate Judge proceeded on the insufficiency of the valuation and stamp for the purposes of the Court-fees' Act, and was not "to the detriment of the revenue," the present appeal does not lie.

(1) I. L. R. 2 Bom. 145.

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Assuming, however, that the appeal would lie, we think that the mode in which the plaintiff has framed his plaint, is so ambiguous that it would be difficult to say, first, whether it is to be regarded as merely praying a declaration that the plaintiff is entitled to require the defendants to account to him, and to permit him to inspect their books, in which case it would be simply a suit for a declaratory decree without seeking consequential relief, and so within article 17, cl. iii of schedule II of the Court-fees' Act (VII of 1870), and it would be the first instance, that we have met, in which the plaintiff sought merely for a declaration of liability on the part of the defendants to account to him without asking for the account itself; secondly, whether it is to be deemed to pray not only for such a declaration, but also for a positive order in the nature of a mandatory injunction for the production of the defendants' books and the offerings—which order would be consequential relief; or, thirdly, whether it is to be regarded as praying the declaration as above, and a positive decree for an account to be taken by the Court, and for the production of the books and offerings—which decree for account and production would be consequential relief.(1) A circumstance unfavourable to the supposition that the plaint is to be viewed as praying an account to be taken by the Court, is that, if this were intended, we might expect the plaint to pray an order for payment of any balance which, on the taking of the account by the Court, might be found due from the defendants to the temple, or a refund, or restoration of any moneys or property which might be missing or unaccounted for, but there is not any such prayer in the plaint.

If the plaint is to be deemed to be either of the 2nd or 3rd species above mentioned, it would range under section 7, cl. iv, article (*c*), as being a suit "to obtain a declaratory decree or order where consequential relief is prayed," and also within article (*d*) of the same clause, being a suit "to obtain an injunction; and, if the plaint be of the 3rd species, it, being a suit "for accounts," would fall under article (*f*) of the same clause

(1) *Note.*—In *Bái Máhkor* v. *Bulákhi Cháku* (I. L. R. 1 Bom. 538) it was held that in a suit to obtain a decree declaratory of the plaintiff's title to the rights of a deceased person, whether it asked merely for the declaration, or added a prayer for possession, "the inheritance is the object in dispute."

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Assuming the plaint to be of the 2nd or 3rd species above mentioned, a nice question would arise upon the 17th section of the Court-fees' Act, viz., Would the plaint require separate stamps under articles (*d*) and (*f*), clause iv, section 7, in respect of the prayer for an injunction for production of books and for an account as "distinct subjects," or, inasmuch as these are "consequential relief," would they be sufficiently covered by the stamp under article (*c*) of the same clause – the suit being one "to obtain a declaratory decree or order, *where consequential relief is prayed*," as contemplated by that article—and whether, if the declaration sought require a stamp, and the account sought another stamp the prayer for an injunction or order for production of books is not merely ancillary to the taking of the account, and, therefore, not a distinct subject.

The learned Judge, in speaking of section 7, cl. iv of the Act says that it is clear that the plaintiff cannot, under that clause, "set any arbitrary valuation upon the relief sought." It is not incumbent upon us now to decide, and we do not purpose to express any opinion upon that point. Whenever it presents itself under such circumstances as to call for a decision, it will be necessary to consider whether the provision that the amount of fee payable in suits falling within that clause shall be computed "according to the amount at which the relief sought is valued in the plaint" is so inconsistent with that portion of section 31 of the Civil Procedure Code (Act VIII of 1859) which permits the Court receiving the plaint to revise the valuation of the claim, as to render that portion of section 31 inoperative in suits within section 7, cl. iv of the Court-fees' Act, notwithstanding the concluding passage in that clause which enacts that, "in all such suits, the plaintiff shall state the amount at which he values the relief sought, and the provisions of the Code of Civil Procedure, section 31, shall supply as if for the word 'claim,' the words 'relief sought' were substituted." It is observable in all of the ten clauses in section 7, with the single exception of clause iv, the Legislature has prescribed an *ad valorem* system or some guide whereby the valuation for the purposes of the Act may be ascertained. But the nature of the suits comprised in the six articles of that clause, which in some instances renders it impossible,

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gr. article (*a*)], and in others, either impossible or generally extremely difficult to lay down an even approximately fair *ad valorem* scale as a means of fixing the Court fee in such suits, would appear fully to account for the Legislature leaving it to the plaintiff to name the valuation, as it *primâ facie* appears to do in enacting that the amount of fee shall be computed "according to the amount at which the relief sought is valued in the plaint." In the case of suits to recover title-deeds, or for an injunction, or for an easement, all of which would come within clause iv, it would generally be impossible to name any except a fancy value. In a suit to enforce a right to a share in joint-family property it is very difficult, and especially so for a parcener other than the family manager, who usually is a defendant, to know with any accuracy what the value of the share may be. All charges on the family property must be ascertained before an approximation can be made to the value of the property which will be divisible amongst the parceners. So, too, in a suit for an account, in many cases the party suing for the account would be quite unable to state what the balance due to him may be. In the present case the plaintiff, from whom the defendants have withheld their books, would not, in all probability, be able to make any trustworthy estimate of the deficiency, if any, in their accounts, and it would be highly unreasonable to require him to pay down a large sum as Court fee on the contingency that the deficiency or balance due to the temple is large. If the plaintiff be at a difficulty in estimating that deficiency, the making good of which must be the object of this suit, (if we are to regard it as a suit for an account to be taken by the Court) the learned Judge would find much greater difficulty in conjecturing what that deficiency may be. It is quite possible that the bulk of the dedicated property is forthcoming, or that its expenditure may be satisfactorily accounted for. If that be so, and the residue to be made good to the temple is small, it would be absurd and unjust to estimate the Court fee by the whole amount of the offerings. Although clause iv of section 7 does say that the fee shall be "according to the amount at which the relief sought is valued in the plaint," which plaint is prepared by the plaintiff, or his pleader, and the fixing of the valuation is thus apparently left to them, and,

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as we have seen, with strong reasons why it should be so left; although also there seems to be, if not absolute repugnancy, at least some incongruity in treating the Judge as at liberty by section 31 of the Civil Procedure Code to pronounce the relief sought to be "improperly valued;" and, lastly, although a field for the application of that section would still remain to the Judge in his power to reject the plaint, if not stamped in accordance with the valuation therein stated, it may be that, nevertheless, the concluding passage in clause iv, section 7 of the Court-fees' Act is too express to admit of a limitation of the power of the Judge to that duty, and leaves him the right to revise the valuation placed on suits under clause iv by the plaintiff. Assuming, without deciding, that to be so, we are of opinion that, generally, it would not be desirable that the Judge should enhance the valuation on the reception of the plaint. In most cases he could only make a conjecture as to the value of the relief sought, and would be quite as likely to be wrong as to be right. In suits for an account the revenue never could unfairly suffer by the refusal of the Judge to enhance the valuation on the reception of the plaint; for section 11 of the Court-fees' Act sufficiently protects the revenue, by preventing the execution of the decree in such (as well as certain other) suits where "the amount decreed" "is in excess of the amount at which the plaintiff valued the relief sought," until the difference, between the fee actually paid and the fee which would have been payable if the true valuation had been placed on the plaint, has been paid to the proper officer.

The learned Judge has dealt with the question of jurisdiction hypothetically only. He says: "*But if it were held that the plaintiff has valued his claim correctly at Rs.* 100, then it would follow that this Court has no jurisdiction to entertain this suit. Under the provisions of section 7, cl. iv of the Court-fees' Act, quoted above, the value of the relief sought is to represent the value of *the subject-matter* of the claim in such cases." We do not, however, find any such provision in that clause. The fee payable is, as already stated, to be "according to the amount at which the relief sought is valued in the plaint," and the first item in clause iv shows that the valuation could scarcely have been intended to represent the value of the subject-matter of the claim, inasmuch as that

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item [article (*a*)] relates to suits "for moveable property where the subject-matter has no market value." The Judge continues thus: "The property to which this suit relates, is situated at Dákor, within the jurisdiction of the 2nd Class Subordinate Judge of Amreth, and if the value of the plaintiff's claim with respect to such property, or, in other words, if the value of the subject-matter of this suit is only Rs. 100, then the plaintiff must go to the Court at Amreth; for the case then does not fall within my special jurisdiction under the provisions of section 25 of the Bombay Civil Courts' Act" (XIV of 1869). That section provides that "a Subordinate Judge of the First Class, in addition to his ordinary jurisdiction, shall exercise a special jurisdiction in respect of such suits and proceedings of a civil nature wherein the subject-matter exceeds Rs. 5,000 in amount or value as may arise within the local jurisdiction of the Courts in the district presided over by Subordinate Judges of the Second Class." Whether or not the First Class Subordinate Judge had jurisdiction, is a question which we do not purpose now to determine. He has decided that the plaint is, for the purposes of the Court-fees' Act, insufficiently stamped; and against that decision the appeal will not lie. That decision being final, the question of jurisdiction does not arise. It is well, however, to remember that a distinction has been taken in the Courts of India and in H. M.'s Privy Council between the valuation of a suit for the purposes of Court fees, and the valuation of a suit for the purposes of jurisdiction: *Jeebrai Singh* v. *Indijeet Mahtoon*; [1] *Nanhoon Singh* v. *Tofanee Singh*; [2] *The Collector of Sylhet* v. *Kali Kumar Dutt*; [3] *Mohunlal Sookul* v. *Beebee Doss*; [4] *Baboo Lekraj Roy* v. *Kanhya Singh*; [5] and *Ajuas Kooer* v. *Mussamat Latifa*, [6] the head-note of which last case is not in accord with the judgment. [7]

The decision as to the inadequacy of the Court fees being final, we refrain from deciding the question of jurisdiction, and dismiss the appeal with costs.

Appeal dismissed.

(1) 12 Beng. L. R., p. 115, note. (2) *Ibid.* p. 113.
(3) 7 Beng. L. R. 663. (4) 7 Moo. Ind. App. 428.
(5) L. R. 1 Ind. Ap. 317. (6) 18 Calc. W. R., 21, 22, Civ. Rul.
(7) *Note.*—On this point see also *Bái Máhkor* v. *Bulákhi Cháku* (I. L. R. 1 Bom. 538) and *Káiu* v. *Vishrám* (I. L. R. 1 Bom. 543).

[APPELLATE CIVIL.]

Before Sir M. R. Westropp, Kt., Chief Justice, and Mr. Justice Melvill.

1877
Sept. 11.

CHATUR JAGSI (PLAINTIFF) *v.* TULSI (DEFENDANT).*

Limitation—Promise—Acknowledgment—Recovery of barred debt—Act XIV of 1859, Section 4—Act IX of 1871, Section 20—Act IX of 1872, Section 25, Clause 3.

Act IX of 1871, section 20, cl. (*a*) does not prevent a plaintiff from maintaining a substantive action on a promissory note passed to secure the amount due on an old note which was barred by limitation at the time of the making of the new, the plaintiff's right to bring such action being recognized by the later enactment Act IX of 1872, section 25, clause 3.

Raghoji v. *Abdul Karim* (I. L. R. 1 Bom. 590) followed.

THIS case was referred for the opinion of the High Court by Chintáman Sakháram Chitnis, Judge of the Court of Small Causes at Kaira.

The plaintiff sued to recover the amount due on two bonds or promissory notes (recorded as exhibits Nos. 3 & 4) purporting to have been passed to the plaintiff by the deceased defendant Tulsi. The notes had been given to secure a debt due to the plaintiff by Tulsi on a previous note dated the 4th April 1871, and which, as it specified no period for repayment, became barred at the end of three years from that date. The new notes were simply acknowledgments, in writing, of the old debt signed by Tulsi, and were dated the 8th April 1874, *i.e.*, four days after the old debt had become barred by lapse of time. The question submitted for the opinion of the High Court was :—Whether section 25, clause 3, of Act IX of 1872 modifies the provisions of section 20 of Act IX of 1871 in such a way as to remove a promise to pay an old debt, drawn up with all the formality of a promissory note or common money bond, from the operation of the latter ?

No counsel or pleader appeared on either side.

WESTROPP, C. J. :—The question raised in this case by the learned First Class Subordinate Judge has already been decided on the 20th of March 1877 in this Court by Melvill and Kemball, JJ., in *Raghoji* v. *Abdul Karim*.[1] A copy of the judgment in that case is herewith forwarded to the First Class Subordinate Judge. In

* Small Cause Court Reference No. 73 of 1877.

(1) I. L. R. 1 Bom. 590.

addition to the cases mentioned in it, the observations of the Court in *Tilakchand Hindumal* v. *Jitamal Sudaram* [1] as to the reason for upholding a promise to pay a debt barred by the Law of Limitation, may be referred to.

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Having come to the opinion that the plaintiff is not prevented by the Indian Limitation Act, 1871, section 20 (*a*), from maintaining a substantive action on the new notes (exhibits 3 and 4), his right to bring such an action being recognized by section 25, clause 3 of the Indian Contract Act, which is the later enactment, we must reverse the decree of the Subordinate Judge, and remand this cause for a new trial on the merits.

Decree reversed.

(1) 10 Bom. H. C. Rep. 206; see pp. 214, 215.

[APPELLATE CIVIL.]

Before Sir M. R. Westropp, Kt., Chief Justice, and Mr. Justice West.

BAPUJI APAJI (ORIGINAL PLAINTIFF), APPELLANT, *v.* SENAVARAJI MARVADI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.* November 29.

Gahan lahan mortgage—Mortgage convertible into a sale—Redemption—Alienation of land—Sale.

Where the grantor executed to the grantee a document reciting a mortgage by the former to the latter of certain lands for Rs. 125, on which Rs. 200 were then due from the grantor to the grantee, and containing an agreement that the grantee should pay Rs. 75 to another creditor of the grantor, and purporting, in consideration of Rs. 275 so made up, absolutely to sell and convey the mortgaged lands to the grantee, and the grantee executed to the grantor a document of the same date reciting the sale of the mortgaged lands by the grantor to the grantee for the consideration of Rs. 275, and covenanting that the grantee should reconvey to the grantor the lands, the subject of the grant, if the grantor should repay to the grantee the sum of Rs. 275 within a certain period, and providing that, in case of default in such payment within such period, the covenant for reconveyance should become null,

Held, that the transaction was a sale and not a mortgage, and that, consequently, the grantor had no right to redeem the lands after the expiration of the period so fixed for the payment of Rs. 275 by the grantor to the grantee, there being no evidence or allegation that, at the date of the execution of the two documents, Rs. 275 were an insufficient consideration for the

*Special Appeal No. 232 of 1877.

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sale of the lands, nor any stipulation that the grantee should account for the rents and profits received by him, or that the grantor should pay interest on the Rs. 275, nor anything to show that the grantor remained in possession after the execution of the two documents, or that subsequently to that time any advances were made by the grantee to the grantor on the security of the lands, nor anything in either document which pointed to a right on the part of the grantee to recover from the grantor the sum of Rs. 275, or any part of it, before, at, or after the period named for the repurchase.

The law as laid down in *Rámji* v. *Chinto* (1 Bom. H. C. Rep. 199), viz., once a mortgage always a mortgage, is still in force, in the presidency of Bombay, with regard to mortgages containing clauses of conditional sale, whether executed before or after 1858.

The ancient law and usage of the country respecting *gahan lahan* mortgages, and generally the alienation of immoveable property, discussed.

THIS was a suit brought in the Court of the Subordinate Judge at Pen for the redemption of certain lands, alleged by the plaintiff to have been mortgaged by his predecessors in title to the predecessors in title of the defendants, but which the defendants contended had in 1858 been absolutely sold to their ancestor by the plaintiff's ancestors in consideration of a sum of money then due by the latter to the former on a mortgage of the same lands, and a further sum to be paid by the defendants' ancestor to another creditor of the plaintiff's ancestors. The Subordinate Judge, being of opinion that the transaction in 1858 was a sale and not a mortgage, dismissed the suit with costs, and this decree was affirmed on appeal by W. Wedderburn, Acting Judge of the District of Thánáá. From his decree the plaintiff preferred this special appeal.

Shántárám Náráyán for the appellant.

M. C. Apté for the respondents.

The facts are stated and the authorities fully considered in the following judgment of the Court, delivered by

WESTROPP, C.J.:—The transaction, the subject of the present suit for redemption, is comprised in two documents, identical in date, which documents bemust, we think, taken together in order to ascertain the nature of the contract between the parties. The date of each is the 12th Jeth sud Shakh 1780 (23rd June, A.D. 1858). Of these documents, one (exhibit 18) executed by the plaintiff's ancestors (the grantors) to the person whom the

defendants represent (the grantee), recites a mortgage dated 7th Magh sud Shakh 1776, (24th January, A.D. 1855) of the lands in question (consisting of upwards of ten *bighas*) by the former to the latter for Rs. 125, on which mortgage the parties agreed that there were, on the 12th Jeth sud Shakh 1780 (23rd June 1858) Rs. 200 due by the grantors to the grantee.

This deed (exhibit 18) further contained an agreement between the parties to it that the grantee should pay to Lakma Raghoji, a Marvadi, Rs. 75, which were due to him by the grantors, and described the whole consideration for this deed as Rs. 275, and then proceeded thus:—"For this (*i.e.* Rs. 275), this land, which we had formerly mortgaged, and which was registered, &c., we have sold to you of our own free will." The details of the land were then stated. "This we have sold to you of our free will and pleasure, do you pay the Government dues of this land from next year, and do you enjoy this land from generation to generation. We have no claim whatever left to this land. You should take *kabulayets* (agreements) from the tenants to whom this land has been let. Should they decline to give them, we will compel them to give them. The produce, whatever it be, you should take. Should any one attempt to set up a claim to this land we will answer him, and, should you suffer any loss in that respect, we will make good the same. And next year we will petition the Government to transfer the land to your name. Should the land be found to be more or less at the next *jamábandi*, the same shall be at your risk. So also should the Government dues be more or less, you shall pay the same; we give to you the muniment of title, the deed of gift, under which we obtained the land in gift. But, after the transfer of the land to your name, we will take back the original, and give you a copy under our signature. And, after our purpose is accomplished, we will again make over to you the original deed of gift. If there be any bonds or ledger accounts in respect of former debts in the name of us two or our junior relative, the same will be invalid."

The fact that the grantee paid, according to the stipulation in that document, the sum of Rs. 75 to Lakma Raghoji on account of the grantors, has not been disputed.

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The other document (exhibit 14), dated the 12th Jeth sud, Shakh 1780 (23rd June, A.D. 1858), and upon which the plaintiff grounded this suit, purported to be executed by the grantee of exhibit 18 to the plaintiff's said ancestors, the grantors of exhibit 18, and runs thus:—"I have given to you Rs. 275 Company's currency, and having purchased your rice lands, containing, &c., on the 12th Jeth sud 1780 (23rd June 1858), took in writing a deed of sale on that day. As to that, should you bring and pay the said Rs. 275 from the month of Magh 1781 to the 13th Vaishak-vad 178 , [the document is here torn where the fourth figure ought to be] I will accept it (the money) and restore to you your land, and transfer it to your name in the Government records. Should you not pay the money according to the above conditions in the month of Vaishak, this *chithi* (writing) becomes null. Should I not take the money in the appointed time, and should you thereby have to stamp this *chithi*, I will make good the expense that will be incurred for that. Jeth sud, 12 Shakh 1780."

A question as to the validity of the stamping of this last-mentioned document has been raised, but it is not necessary for us to decide it. It has been found as a fact, by both of the Courts below, that neither the plaintiff nor his ancestors paid or tendered the sum of Rs. 275 previously to the 13 Vaishak vad 1789, which was the latest time that could have been specified in exhibit 14 in the portion of it which is now torn, and it is not denied that this suit was not brought until after the time named for repayment had elapsed. But it is contended that the two documents, of the 12th Jeth sud, 1780, constitute a mortgage and not a sale with a condition to repurchase; and that this suit for redemption, having been brought in A.D. 1872, and, therefore, within sixty years from the date of those documents, is, according to Act XIV of 1859, s. 1, cl. 15, sustainable.

The date of the transaction being the 23rd June 1858, it becomes necessary, with respect to certain important observations of their Lordships of the Privy Council in *Thumbasawmy Mudelly* v. *Mahomed Hossáin Rowthen*,[1] decided in 1875, to resolve whether we should approach the consideration of this case from the point of view

(1) L. R. 2 Ind. Ap. 255; S. C. I. L. R. 1 Mad. 1.

that the doctrine laid down in 1864 by three of the former Judges of this Court in *Ramji* v. *Chinto*, (1) and ever since uniformily followed here, (2) is that which regulates the law of redemption in this Presidency. If it do not, and if the law as laid down for Madras in *Pattabhiramier* v. *Vencatarow Naicken*, (3) prevails now in Bombay, the decision of this case would be a very simple matter, and it would be sufficient to say that, whether or not the transaction of the 12th Jeth sud Shakh 1780 (23rd June 1858) was in the first instance a mortgage, the plaintiff's suit for redemption must fail, because the time named, within which the plaintiff might have re-acquired the land by payment of the sum of Rs. 275, had elapsed before suit brought. In *Pattabhiramier* v. *Vencatarow Naicken*, (4) Lord Chelmsford, in delivering the judgment of the Privy Council in 1870, said:—"What is known in the law of England as the 'equity of redemption' depends on the doctrine established by Courts of Equity, that the time stipulated in the mortgage deed is not of the essence of the contract. Such a doctrine was unknown to the ancient law of India; and if it could have been introduced by the decisions of the courts of the East India Company, their Lordships can find no such course of decision. In fact, the weight of authority seems to be the other way. *It must not then be supposed that, in allowing this appeal, their Lordships design to disturb any rule of property established by judicial decisions so as to form part of the Law of the Forum, wherever such may prevail, or to affect any title founded thereon.*" In 1872, in *Shankarbhai* v. *Kassibhai*, (5) it became necessary for this Court to consider whether the decision in *Pattabhiramier* v. *Vencatarow Naicken*, (6) rendered it necessary that the course pursued in *Rámji* v. *Chinto* (7) should be abandoned, and a Full Bench of three Judges sat for the purpose. That Court, having regard to the concluding sentence in the passage just quoted from the judgment of Lord Chelmsford, and to the fact that, from August 1864 down to May 1872, a period of about eight years, the doctrine of *Rámji* v. *Chinto*(8) had been uniformly followed in this Presidency in a multitude of cases, arrived, without hesitation, at the con-

(1) 1 Bom. H. C. Rep. 199.
(2) 9 Bom. H. C. Rep. 69, 79.
(3) 13 Moore I. A. 560.
(4) 13 Moore I. A. 560.
(5) 9 Bom. H. C. Rep. 69.
(6) 13 Moore I. A. 560.
(7) 1 Bom. H. C. Rep. 199.
(8) 1 Bom. H. C. Rep. 199.

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clusion that there Lordships of the Privy Council did not desire or intend that the decision in *Pattabhiramier* v. *Vencatarow Naicken*,(1) which case had been pending in the Privy Council for about ten years, and which went from the Presidency of Madras, should have the effect of overturning the practice so firmly established in the mofussil of this Presidency, and which had always prevailed in the island of Bombay. On the same day a Full Bench of four Judges, in *Krishnáji* v. *Rávji*, (2) and in two other cases mentioned in the note to the report of that case, (3) came to the same decision. We do not gather from the judgment of the Privy Council in the subsequent Madras case of *Thumbasawmy Mudelly* v. *Mahomed Hossain Rowthen* (4) that this Court misunderstood the concluding sentence in the passage of the judgment of Lord Chelmsford which we have quoted. In *Thumbasawmy Mudelly* v. *Mahomed Hossain Rowthen*, (5) their Lordships, after adverting to the cases, said:—"The state of the authorities being such as has been described, it may obviously become a question with this Committee in future cases whether they will follow the decision in 13th Moore (*Pattabhiramier* v. *Vencatarow Naicken*), which appears to them based upon sound principles, or the new course of decision that has sprung up at Madras and Bombay, which appears to them to have been *in its origin* radically unsound. On a stale claim to redeem a mortgage, and dispossess a mortgagee, who had, before 1858, acquired an absolute title, there would be strong reasons for adopting the former course. In the case of a security executed since 1858, there would be strong reasons for recognizing and giving effect to the Madras authorities, with reference to which the parties might be supposd to have contracted. *Their Lordships abstain from expressing any opinion upon this question until the necessity for determining it shall arise.* They deem it right, however, to observe that this state of the law is eminently unsatisfactory, and one which seems to call for the interposition of the Legislature. An act affirming the right of the mortgagor to redeem until foreclosure by a judicial proceeding, and giving to the mortgagee the means of obtaining such a foreclosure, with

(1) 13 Moore I. A. 560. (2) 9 Bom. H. C. Rep. 79. (3) At p. 83.
(4) L. R. 2 Ind. Ap. 255; S. C. I. L. R. 1 Mad. 1.
(5) L. R. 2 Ind. Ap. 241, 255; S. C. 1. L. R. 1 Mad. 1

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a reservation in favour for mortgagees whose titles, under the law as understood before 1858, had become absolute before a date to be fixed by the Act, would probably settle the law without injustice to any party." In Madras the system of permitting redemption was adopted in 1858, and in Bombay the decision in *Rámji* v. *Chinto*[1] was made in 1864. The observations of Lord Chelmsford guarding against the supposition of any design on the part of their Lordships of Her Majesty's Privy Council to disturb any established course of decisions were general, and took no distinction between mortgage transactions in Madras before 1858 and in Bombay before 1864, on the one hand, and mortgage transactions of later date on the other; and they were accepted as general by this Court, when, in 1872, it became necessary for it, in the cases already mentioned, to consider the scope of the judgment in *Pattabhiramier* v. *Vencatarow Naicken*.[2] That case was heard *ex parte* in the Privy Council,—a fact which appeared to this Court to have probably been a special reason for the cautious reservation in the judgment given on behalf of their Lordships by Lord Chelmsford. *Rámji* v. *Chinto*[3] and the subsequent Bombay decisions were not then brought to their attention, and under all the circumstances we do not perceive how the Judges of this Court could have interpreted that reservation otherwise than they did.

The decision in *Thumbaswmy Mudelly* v. *Mahomed Hossain Rowthen*,[4] in which case the observations upon *Rámji* v. *Chinto*,[5] which we have quoted, were made, was, in fact, that the deed was a mortgage and not a conditional sale, and accordingly the mortgagors were permitted to redeem. Those observations were fairly elicted by the turn which the argument of counsel took, but were not absolutely indispensable to the decision, as the nature of the decree made shows. Again, it must be remembered that the case came from Madras, and the Madras law only was the actual subject for determination. Finally, their Lordships, while intimating that there were strong reasons in favour of allowing redemption where the mortgages with clauses of conditional sale

(1) 1 Bom. H. C. Rep. 199. (2) 13 Moore I. A. 560.
(3) 1 Bom. H. C. Rep. 199. (4) L. R. 2 Ind. Ap. 241; S. C., I. L. R., 1 Mad. 1.
(5) 1 Bom. H. C. Rep. 199.

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bear date subsequently to 1858, and of refusing redemption where the mortgages were anterior to 1858, expressly, as we have seen, abstained from giving any opinion on that question until the necessity for determining it should arise. In this state of facts we must regard the law as laid down for this Presidency by former Judges of this Court in *Rámji* v. *Chinto*(1) as in force. That case, although reflected upon, has not been overruled. It has, in this Presidency, been uniformly followed, and having been adopted by Full Bench decisions of this Court, which bind it and all Courts subordinate to it, must, we think, govern mortgages with clauses of conditional sale executed either before or after 1858 or 1864, until the contrary be expressly ruled by the Privy Council or ordained by the Legislature. Special regard should be had to the terms which this Court has, with reference to improvements, repairs, &c., made by mortgagees in possession, imposed upon mortgagors seeking redemption in cases in which it would be equitable to recoup mortgagees for expenses thus incurred.(2)

Mr. Macpherson's treatise on mortgages is written only with reference to Bengal and the N. W. Provinces. It, consequently, is seldom referred to here, and has but little bearing upon the law or usage as to mortgages in this Presidency, of which that learned writer had not any experience. He speaks (p. 11, 2nd edition) of the *bye bil wufa*—a term almost wholly unknown here to mortgagors and mortgagees: † and of the *kut kubala*—also unknown here in the sense of "conditional sale," that in which he employs it. Literally, *kut kubala* signifies a written agreement, and would not there be understood as having the technical sense of "conditional sale." The term here usually applied to contracts, which undoubtedly are, in their inception at least, mortgages, but which contain a clause of conditional sale if the mortgage debt be not paid within a given time, is *gahan lahan*.

In *Shankarbhai* v. *Kassibhai*(3) it was said, with reference to *Rámji* v. *Chinto*,(4) that "the recognition of the right to re-

(1) 1 Bom. H. C. Rep. 199. (2) See 9 Bom. H. C. Rep., pp. 72, 73.

* The only instance known of a mortgage having been so denominated in this Presidency is in *Mancharsa* v. *Kamrunisa* (5 Bom. H.C.R., 109 A.C.J.). The mortgagor there, being a Mussulman, probably imported the phrase from the other side of India, and did so with a slight variation.

(3) 2 Bom. H. C. Rep. 72. (4) 1 Bom. H. C. Rep. 199.

deem" (in *gahan lahan* mortgages, where the time fixed for the sale to become absolute had expired) "was, having regard to the previous decisions of the Sadr Adálut, perhaps somewhat a strong measure," and that remark was justified, inasmuch as there had been several decisions of the Sadr Adálut which had given a strict operation to the clause of conditional sale contained in *gahan lahan* mortgages. *Rámji* v. *Chinto*, (1) therefore, must be viewed as, to a certain extent, a breach of the venerable rule *stare decisis*, and in that respect to be regretted; but it was not intended, by the remark in *Sankarbhai* v. *Kassibhai*, (2) to intimate any opinion that those decisions of the Sadr Adálut were in conformity with the usage of the people of this presidency as to such mortgages, which usage the Sadr Adálut was bound to follow, or, in default of usage, "equity and good conscience." (3) In *Rámji* v. *Chinto* (4) it was said:—"It does not appear that there is any law, or usage having the force of law, among Hindus, justifying such a departure from the established rule of the English Courts of Equity, which is, besides, manifestly 'a rule of good conscience.'" The Court was there speaking of the usage of this presidency, and the circumstance should not be overlooked that the members of that Court associated with Sir Joseph Arnold, himself an able Judge, were a Hindu gentleman and a European member of the Civil Service, both of extensive experience in the mofussal of this Presidency. Not only is there is not any reason for believing that the Courts of Justice, or Nyadesh, which existed here anterior to British rule, treated such mortgages as irredeemable, after the time fixed had expired, or enforced them as effective sales; but there is strong ground for believing that those mortgages never were so regarded by the people at large. Instances were, and still are, of frequent occurrence in which, after the time fixed for the payment of such mortgages had elapsed, and, according to the terms of the *gahan lahan* clause, the mortgage had, ostensibly, become converted into a sale, the mortgagee made to the mortgagor further advances on the property the subject of the mortgage, and, as a general rule, the

(1) 1 Bom. H. C. Rep. 199. (2) 9 Bom. H. C. Rep. 72.
(3) Bom. Reg. II. of 1800, Sec. 14; Bom. Reg. IV. of 1827, Sec. 6.
(4) 1 Bom. H. C. Rep. 199.

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mortgage money is far below the value of the land, and would be wholly indequate for its fair purchase. We do not know of any instance in which a suit, in British Courts, to foreclose *gahan lahan* mortgages has been rejected, and it is within the knowledge of the Judges of the present Division Bench that decrees for foreclosure and sale in such suits have been made, in which decrees a reasonable time (generally six months) has been given to the mortgagors to redeem. Although the High Court in *Rámji* v. *Chinto* (1) were guilty of an infraction of the maxim *stare decisis*, we believe the original innovation upon a well-settled and most beneficial usage was that of the Sadr Adálut, and that the Judges who decided *Rámji* v. *Chinto* reverted to the generally-understood construction of *gahan lahan* mortgages.

The reluctance of the people of this country to sell their immoveable property may be traced back for a long period. It is strongly manifested in chapter I, section 1, pl. 32 of the Mitakshara, which approves of mortgages, but reprobates sales, without absolutely pronouncing them to be invalid, adding that "if a sale must be made it should be conducted, for the transfer of immoveable property, in the form of a gift, delivering with it gold and water," as Mr. Colebrook states, "to ratify the donation." The Rishi Usanas went so far as to enumerate land amongst those species of property which are impartible. His Smriti to that effect is quoted by Vijayanesvara in the Mitakshara, chapter I, section 4, pl. 26, and by Devanda Bhatta in the Smriti Chandrika, chapter VII, pl. 44. Debendra Bhatta, however, says that this text is to be overlooked and partition made. Usanas, however, did not stand alone in his doctrine. Prajapati also treated land as indivisible. His text is quoted by Devanda Bhatta (Smr. Chand., chapter VII, pl. 49) as laying down that "no one is competent even to make a partition of the inheritance descended from ancestors. It is simply to be enjoyed; *there can be no gift or sale of the same.*" Against this may be placed what the same Smriti writer is quoted by Devand Bhatta (pl. 47) as saying in favour of partition of houses and land. We are not to be understood as treating these texts of the Rishis, denouncing partition of immoveable property, as of any present operative force. We merely refer to them as showing how

(1) 1 Bom. H. C. Rep. 199.

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deep-seated in remote times was the antipathy of Hindus to aught even approaching an alienation of land. Mr. Steele, in his Law of Caste and Custom in the Deccan, p. 78, 1st ed., 81 (p. 72, 2nd ed.) says:—"There is no limit to the right of ownership of (immoveable) property pledged, by lapse of time; heirs of the original pledger may always claim it on repayment of the debt and interest." And, so far as regards usufructuary pledges, of which the *gahan lahan* mortgage on land is one, he is supported by an ancient text of the Rishi Vyasa, who, distinguishing between usufructuary and other pledges, says:—"But a pledge to be used of which the term has elapsed, the debtor shall only recover on then paying from other funds the exact amount of the principal;" (1) and also by a text from Narada, who, speaking of pledges generally, says that they are not lost to the owner through their being possessed by a stranger; (2) and Yajnyavalkya similarly favours pledges. (3) Subsquently, however, at p. 80, pl. 86 (p. 74, 2nd ed.) of his book, Mr. Steele says that "after Smarte Karl (Kale), the period beyond which recollection does not extend, viz., 100 years, he (the mortgagor) loses his ownership in the property." In this also he is supported by Narada, (4) who, it must be remembered, represents a more modern phase of doctrine then the Smriti writers, Usanas, Prajapati, and Yajnyavalkya, above quoted.

In the country under Mahratta rule, as the greater part of this Presidency was, the ryot, who was a landed proprietor, was generally known as a *mirasdar*, and his holding as *miras*. (5) In that portion of the able report of the Commission for inquiring into the causes of the recent riots in the Deccan, which describes "the condition of the ryot as regards his relation to the money-lender when British rule commenced" (chapter III, p. 27) it is said: "There was a considerable burden of debt, and many of the ryots were living in dependence upon the sáukar (money-lender), delivering to him their produce, and drawing upon him for necessaries. The ryots' property did not offer security for large amounts; his cattle and the yearly produce of his land being the lender's secu-

(1) I. Dig. Bk. I., ch. 3, pl. cxvi, 2nd. cl. (2) Jolly's trans. of Narada, p. 24, pl. 9.
(3) I. Dig. Bk. I., pl. cxiii, cxiv. (4) Jolly's trans. p. 25, pl. 18.
(5) See Deccan Commission's Report, chap. III., pp. 28, 30, paras. 43, 45.

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rity, the mortgage of mirás land was rather a means by which the sáukar got a firmer hold upon the produce than upon the land itself, *for immoveable property was not sold for debt*, and the mirás title would have no value for a non-agricultural landlord." And, again, "the creditor received little or no assistance from the State in recovering debts, but had great licence in private methods of compulsion." What those private methods were is previously described at p. 26, thus:—"The usual and recognized method for recovery of debt was for the sáukar to send a mohosul (muhassil), that is, a servant whose maintenance had to be paid by the debtor, or to place a servant in 'dharna' at his door, which is the process called tuqaza (tagada or takaza) by Mr. Chaplin, or to confine the debtor in his house, or otherwise subject him to severer measures." (1) Those severer measures are detailed by Mr. Mountstuart Elphinstone. Describing takaza he says: "Though it strictly means only denouncing, it is here employed for everything, from simple importunity up to placing a guard over a man, preventing his eating, tying him neck and heels, or making him stand on one leg with a heavy stone on his head under a vertical sun." (2) Captain Grant's report of 30th April 1819 (3) shows that such was the made of enforcing payment of debts. Mr. Chaplin, in his report of the 20th June 1819, (4) said, with reference to the enforcement of decrees: "The person cast seldom had his property sold; but he was compelled to submit to much personal violence, amounting to a degree of torture, &c." There were, in fact, very few regular courts. (5) Mr. Chaplin, in his report of the 20th August 1822, para. 112, says: "In the commentaries of Hindu law it is said that land can be conveyed by the formal assent of the townspeople; but it is also declared that the permission of the king, if not his express assignation, is necessary to give validity to the alienation. This rule seems to be recognized by most Hindu law authorities, and it would, in my opinion, be superfluous to cite facts to prove that it is the established usage.' And, again, in para. 121, he says that the mirásdárs "seldom alienate the mirás right except in case of urgent necessity."

(1) See *also* Wilson's Glossary, pp. 138, 502.

(2) 4 Revenue Selections 193, Report of 25th Oct. 1819.

(3) *Ibid.* p. 228. (4) *Ibid.* p. 260. (5) *Ibid.* p. 262.

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Of Central India, where, as well as in this Presidency, the Mitakshara is held in great repute, Sir John Malcolm, in vol. II., p. 75 of his work on that country, observes that "The cultivators are chiefly of the hereditary class, and have not only a right to till the ground, but, if in distress, can mortgage it; and to take it from them, under any circumstances, is deemed the extreme of tyranny."

Notwithstanding this general reluctance to sell, sales were, to some extent, made and carried into effect anterior to British rule; but (generally speaking) those were from the commencement of the transaction intended to be sales, and not contracts which, in their inception, were mere securities for money lent. Such sales were made of immovable property, as well of superior as of inferior classes of tenure, and have been subsequently, and still are, supported by the British Courts when not restricted by special legislation [1] (see *Krishnáráw* v. *Rangrav* [2] and the cases and authorities there collected, and *Vyakunta Bâpuji* v. *The Government of Bombay* [3]) and when not prohibited by the common law or usage of the country [4] or by some special law affecting the parties. Our reports are full of cases in which private sales of immovable property, which were complete, have been supported.

Taking, then, *Rámji* v. *Chinto* [5] to be law in this Presidency, and that, accordingly, the rule is, once a mortgage always a mortgage, it becomes necessary to consider whether the transaction of the 12th Jeth-sud, Shak 1780 (23rd June 1858), comprised in exhibits 18 and 14, ever was a mortgage. If the transaction were, *in its inception*, really intended by the parties to be a mortgage, the mere circumstance that the condition for re-purchase is contained in a separate instrument, could not prevent the grantors from having the right now to redeem. The question is—did there, after the execution of exhibits 18 and 14, remain any debt

(1) Such *ex. gr.* as Bom. Reg. XVI. of 1827, s. XXI., cls. 1 and 2.

(2) 4 Bom. H. C. Rep., 1 A. C. J.

(3) 12 Bom. H. C. Rep., Appx., pp. 50, 71, 100, 171, and, in addition to the references to vol. 4 of Revenue Selections given there in note (*q*), 71, *see* pp. 411, 651, and 179 of that vol. of Rev. Sel.

(4) *Ex. gr.* as in the case of *Jagirs*. *Hari Rámchandra* v. *Nárâyán Ráo*, Reg. Ap. 39 of 1872 (decided on review, 13th June 1877). Printed judgments of 1877, p. 121.

(5) 1 Bom. H. C. Rep. 199.

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due from the grantors of exhibit 18 to the grantee of that instrument; or, in other words, could the grantee have enforced repayment of the sum of Rs. 275 by the grantors? In *Goodman* v. *Grierson*, (1) which was a suit for redemption, Lord Manners, C., said: "The fair criterion, by which the Court is to decide whether this deed be a mortgage or not, I apprehend to be this. Are the remedies mutual and reciprocal! Has the defendant the remedies a mortgagee is entitled to? I conceive he has not. Suppose, for instance, the defendants (mortgagees) to file a bill of foreclosure. By the practice of this Court (Irish Court of Chancery), the decree is for a sale of the mortgaged premises, if they be not redeemed within the time limited by the course of the Court: suppose the sale to take place, and the produce to be insufficient to discharge the £1,000 and costs, how is the deficiency to be raised? What remedy could the defendants then have? If it were a mortgage, he, in that case, might proceed on his covenant or bond upon the implied assumpsit; but how could any action be maintained in this case, when the defendants have taken the conveyance, not as a security, but expressly in lieu and satisfaction of the portion of £1,000? This appears to me decisive to show that the transaction between these parties was not that of a mortgage, but a conditional sale; for, if the defendants have not all the remedies of a mortgagee, why am I, contrary to the express provisions of this deed, to hold it to be a mortgage, and to extend the condition beyond the limit agreed upon by the parties to this deed? There would be much hardship and inconvenience to the one party; and there appears to me to be no substantial ground to entitle the other to relief." His Lordship referred to a note (No. 96) by Mr. Butler to his edition of Coke upon Littleton, 205*a*, where, in considering what constitutes a mortgage, Mr. Butler says: "No particular words or form of conveyance are necessary for this purpose. It may be laid down as a general rule, and subject to very few exceptions, that wherever a conveyance or assignment of an estate is originally intended as a security for money, whether this intention appear from the deed itself or by any other instrument, it is always considered in equity as a mortgage and redeemable; even though there is an express agreement

(1) 2 B. & B. 279.

of the parties that it shall not be redeemable, or that the right of redemption shall be confined to a particular time, or to a particular description of persons." After referring to numerous decisions in support of those views, Mr. Butler continues thus :—"In many of these cases the Courts have found it necessary, not only to apply their general principles, but to determine the fact, whether the conveyance was intended as an absolute sale, or as a security for the money. If the money paid by the grantee was not a fair price for the absolute purchase of the estate conveyed to him; if he was not let into the immediate possession of the estate; if, instead of receiving the rents for his own benefit, he accounted for them to the grantor, and only retained the amount of the interest; or, if the expense of preparing the deed of conveyance was borne by the grantor, each of these circumstances has been considered by the Courts as tending to prove that the conveyance was intended to be merely pignorititious. It seems, however, to be settled, 1st, that a *bonâ fide* purchaser of an estate or interest will not be considered a mortgagee on account of a right to purchase being given to the vendor, though at an advanced price: *Verner* v. *Winstanley* (1); and, 2ndly, that where the mortgagee, or trustee for him, is authorized to sell, if the money be not paid at a particular time, he may make a good title to a purchaser, though the mortgagor do not join in the conveyance. *Clay* v. *Sharpe*." (2)

Applying this doctrine to the present case (but not by any means asserting that Mr. Butler's enumeration of the indications that a transaction is a mortgage and not a sale is exhaustive), we find neither evidence nor allegation that Rs. 275 were, at the date of exhibits 18 and 14, an insufficient consideration for the sale of the land. Further, we do not find any stipulation that the grantee should account for the rents and profits during the possession, or for payment of interest by the grantors on the sum of Rs. 275, either before, at, or after the expiration of the time fixed within which the lands might be repurchased by the grantors. Had there been any such stipulation, it might have aided us in arriving at the conclusion that the transaction was the creation of a debt,

(1) 2 Sch. & Lef. 393.

(2) Chan. M. T. 1802, reported by Mr. Sugden in his Law of Vendors, 4th ed., App. No. XIII.

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and not a sale. A mere stipulation, however (unaccompanied by any other indication that the transaction was a mortgage), that, should the re-purchase take place, the original purchase-money shall be repaid with interest, has been held by Lord Cottenham, overruling Shadwell, V.C., insufficient to stamp a case as one of mortgage and not of sale: *Williams* v. *Owen*. (1) Again, there is nought to show that the grantors remained in possession after the execution of exhibits 18 and 14, or that, subsequently to that time, any advances were made by the grantee to them on the security of the land. There is not in either of these documents anything which points to a right on the part of the grantee to recover from the grantors the sum of Rs. 275, or any part of it, either before, at, or after the period named for the re-purchase. In short, we do not find any one of the usual indicia which might lead the Court to the opinion that the transaction was a mortgage and not a sale. In *Verner* v. *Winstanley*, (2) *Murphy* v. *Taylor*, (3) there were collateral bonds which vitiated the transactions there as sales, and showed that the parties all along contemplated the subsistence of a debt. We have nothing of that kind in this case. It strongly resembles *Ensworth* v. *Griffith*.(4) There the relation of mortgagor and mortgagee had once existed, and the mortgagor, in consideration of the mortgage debt, and of a further sum paid, released the equity of redemption, and at the same time the mortgagee signed an agreement to reconvey the premises upon payment of the two sums within one year. A bill for redemption, brought in the Court of Exchequer, was dismissed, and the dismissal was affirmed by the House of Lords. In *Williams* v. *Owen*,(5) already mentioned, and which, in respect of the circumstance as to interest which I have stated was a stronger case in favour of the grantors than the present, Lord Cottenham said:—"That this Court will treat a transaction as a mortgage, although it was made so as to bear the appearance of an absolute sale, if it appear that the parties intended it to be a mortgage, is, no doubt, true; but it is equally clear, that if the parties intended an absolute sale, a contemporaneous agreement for a repurchase, not acted upon, will

(1) 5 Myl. & Cr. 303. (2) 2 Sch. & Lef. 393. (3) 1 Ir. Ch. Rep. 92.
(4) 5 Bro. P. C. 184. (5) 5 Myl. & Cr. 303; *see* p. 306.

not, of itself, entitle the vendor to redeem;" and he expressed his approbation of Lord Manners' doctrine in *Goodman* v. *Grierson*, (1) and eventually said:—"If the transaction was a mortgage, there must have been a debt, but how could Owen have compelled payment? It appears also that he, as purchaser, paid for the conveyance, and was, at all events, to be at liberty to keep the rents."

So recently as the 4th July last, in Regular Appeal 23 of 1877,(2) a Division Bench of this Court acted on the principle laid down by Lord Manners in *Goodman* v. *Grierson*, (3) where the grantee under a deed had no remedy to recover as a debt the consideration money for the deed, which we held to be a sale, liable, on a contingency which did not happen, to be converted into a mortgage, and not, like *Ramji* v. *Chinto*, (4) and *Shankarbhai* v. *Kassibhai*, (5) and the cases collected in it, which were instances of mortgages liable in terms to be converted into sales.

We see no ground for supposing that the defendants, or the persons whom they represent, had, from the 12th Jeth-sud, Shak 1780, the date of exhibits 18 and 14, any right to sue for or recover the sum of Rs. 275 (the consideration for exhibit 18), or any part of it; we must, therefore, hold the transaction of that date to have been a sale and not a mortgage, and that the plaintiff's suit to redeem was rightly dismissed. On these grounds we affirm the decree of the District Judge, with costs of the special appeal.

We have consulted our brothers Melvill and Pinhey as to the views expressed in this judgment, and are authorized by them to say that they concur in those views.

Decree affirmed.

(1) 2 B. & B.279. (2) *Subábhat* v. *Vasudevbhat*, I. L. R. 2 Bom. 113.
(3) B. & B. 279. (4) 1 Bom. H. C. Rep. 199.
(5) 9 Bom. H. C. Rep. 69.

[APPELLATE CIVIL JURISDICTION.]

Before Mr. Justice West and Mr. Justice Pinhey.

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MORESHWAR BAPUJI PHATAK (APPLICANT) *v.* KUSHABA SHANKROJI AND ANOTHER (OPPONENTS).*

Code of Civil Procedure (Act VIII. of 1859), *Section* 73—*Act XXIII. of* 1861, *Section* 11—*Conveyance subsequent to a decree in appeal—Death of the party execequting the conveyance—Admissibility of the purchaser to carry on a special appeal.*

A sued B in the Court of first instance, and obtained a decree declaring A's right to a house. The District Court, in appeal, reversed this decree and rejected A's claim. The High Court reversed the decree of the District Court, and remanded the appeal. The District Court, on remand, made a decree confirming the original decree of the Court of first instance in A's favour. Subsequently to the last-mentioned decree of the District Court, B sold the house to C. B then preferred a special appeal to the High Court, but died before it was heard.

Held, under Act VIII. of 1859, that C could not carry on the special appeal after B's death.

THIS was an application made by Moreshwar Bápuji Phátak to be admitted as a special appellant in succession to the defendant Pitámbardhári, who died after filing the special appeal in the High Court.

The plaintiffs Kushábá and Rámji sued the defendants Pitámbardhári and Govindráv to establish their proprietary right to a house. The Court of first instance gave a decree in the plaintiffs' favour. The Assistant Judge of Puna, Mr. Ayerst, reversed that decree, and rejected the plaintiffs' claim as being barred by lapse of time. The High Court in special appeal remanded the cause for re-trial on the merits. Mr. Hosking, the then Assistant Judge of Puna, on remand from the High Court, confirmed the decree of the Court of first instance, awarding the plaintiffs' claim on the 13th of April 1875. The original defendant, Pitámbardhári, after the passing of this decree, *i. e.*, on the 30th April 1875, conveyed the house—the subject of the litigation—to the applicant Moreshwar. He then filed a special appeal, but, before it came on for hearing, he died.

Moreshwar, the purchaser, therefore, applied to have his own name substituted in succession to that of Pitámbardhári.

* Civil Application No. 79 of 1877.

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The High Court granted a rule *nisi* to show cause why Moreshwar's application should not be complied with.

Bahiravnath Mangesh showed cause:—Persons who are not before the Court can be made parties only under section 73 of Act VIII. of 1859. This section refers to a suit during its pendency. If the only special appellant on the record dies, leaving no heirs, there is an end of the cause, section 102. The provision of the Code in section 208, in respect of transference of a decree by assignment or by operation of the law, refers to decree-holders, not to persons in the position of the defendant Pitámbardhári, against whom a decree has been passed. In *Gajadhar Prasad* v. *Ganesh Tewari* (1) Glover and Mookerjee, JJ., held that the purchaser of the right, title, and interest of a defendant had no right, as such, to appeal from a decree passed against the defendant. In *Judooputtee Chatterjee* v. *Chunder Kant Bhuttacharjee* (2) Sir Barnes Peacock observed that "he was not aware of any section in Act VIII. of 1859 under which the Court was authorized to substitute Judooputtee's name for that of the original plaintiff," though he remarked that under the Act the name of Judooputtee might possibly have been allowed to be added as a co-plaintiff. Again, in *Dhunnoo Sowdagur* v. *Sunnoo Bibee* (3) it was held that a party who purchased the rights and interests of the plaintiffs after a suit had been dismissed was not entitled to appeal against the order of dismissal without joining the original plaintiffs as appellants. It is, therefore, submitted that the name of Moreshwar cannot in this appeal be substituted for that of his deceased vendor Pitámbardhári.

Shantaram Narayan in reply in support of the rule:—The cases cited are distinguishable from the present case in this, that in them the applicants sought to displace a party on the record, while in this the applicant claims to succeed his vendor.

[WEST, J.:—In *Hooper* v. *Smart*, (4) Vice-Chancellor Hall, speaking of persons taking for value, as purchasers, under residuary legatees, says: "They took only as purchasers and transferrees of choses in action, and such purchasers and transferrees are always exposed to great risk."]

(1) 7 Beng. L. R. 146. (2) Calc. W. R. 309 Civ. Rul.
(3) 15 Calc. W. R. 106 Civ. Rul. (4) L. R. 1 Ch. D. 90; see p. 89.

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That case differs from the present, as it proceeds on the principle of *pendente lite nihil innovetur*. I mainly rely on the wording of section 11 of Act XXIII. of 1861 as furnishing an analogy. Again, if under section 73 of the Civil Procedure Code a purchaser could be added as a party and allowed to maintain an appeal, there seems to be no reason why the death of his vendor should deprive him of that privilege.

The judgment of the Court was delivered by—

WEST, J.:—The question in this case is whether Moreshwar, a purchaser, subsequent to the decree against Pitámbardhári in regular appeal, can now, when Pitámbardhári has died, maintain a special appeal filed by Pitámbardhári for the reversal of the decree. It is contended by Mr. Shantaram that the purchaser under such circumstances is a representative of the deceased, entitled in that character to carry on the litigation through the several stages allowed by the Code of Civil Procedure, and he relies on the cases disposed of under section 11 of Act XXIII. of 1861 as furnishing an analogy by which the Court should be guided in disposing of Moreshwar's application in the present instance. Those cases, however, proceed always on the assumption that the points brought under adjudication in the judgment sought to be executed have been finally disposed of. It is only questions arising in execution, and not thus previously disposed of, that have been allowed to be contested under section 11 of Act XXIII. of 1861. An objection, however valid, which might have been taken to a decree in regular appeal by means of a special appeal, is not allowed to be raised in the execution of a decree so as, by the introduction of new interests, to deprive the decree of any part of its intended operation between the parties.

The admission of a purchaser of a property in litigation as an additional defendant under section 73 of the Code of Civil Procedure, which has been allowed in several cases, would, no doubt, according to the usual practice, entitle him to maintain an appeal; but this admission itself, after the nature of the litigation and the questions to be disposed of have been settled by the statements of the original parties, must, we think, be looked on as a privilege or indulgence upon which an argument is not to be

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founded for an extension of the rule as embodying a general principle to other apparently analogous cases. The suit as brought in the present case did not touch any interest of Moreshwar's, and such an extension as is here proposed has not hitherto been made of the right of appeal on account of newly-constituted interests; or, if it has, no instance of it has been cited to us.

We are of opinion that the language employed by Sir T. Plumer, M.R., in *Metcalfe* v. *Pulvertoft*, (1) and cited by the Chief Justice of this Court in *Báláji Ganesh* v. *Khushálji*, (2) though capable of being explained away in a somewhat different sense, may yet be applied, and properly applied, to the particular case now before us. He speaks of the conveyance *pendente lite* "having no effect, with reference to any beneficial result against the plaintiff in that suit;" and it is clear that the purchaser in this case would, as against the plaintiff, derive a "beneficial result" from his purchase if allowed to retain the house awarded to the plaintiff, and to prosecute a special appeal, or force the plaintiff to a compromise in order to save the expense of litigation. At the time of Moreshwar's purchase, Pitámbardhári's alleged right as owner had been pronounced against by a Court of competent jurisdiction. What remained to him was a right to challenge that decision by a special appeal. In purchasing this right, Moreshwar, we think, purchased it, subject to the chance of the plaintiff's title becoming unimpeachable on account of Pitámbardhári's failing through death to make or carry on the possible appeal, not a right after Pitámbardhári's death to continue the litigation on his own account. The property sued for, if it did not become *res litigiosa* in the full sense of the Roman Law so soon as the parties were at issue, was yet, we think, so bound when a decree had awarded it to the plaintiff, that it could not effectively be assigned to a third party so as to give a new term of life to the litigation, which, in the absence of the assignment, would have died with Pitámbar. By his purchase, Moreshwar could acquire an equitable right operating against Pitámbardhári's conscience when the means of satisfying it should come into

(1) 2 V. & B. 200; see p. 205. (2) 11 Bom. H. C. Rep. 24; see p. 28.

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Pitámbardhári's power, but none against the plaintiff, a stranger to the bargain and Pitámbardhári's antagonist. The conclusion we have arrived at is, we think, to some extent at least, supported by the observations of Hall, V.C., in the case of *Hooper* v. *Smart*, (2) although that case was itself, no doubt, quite different from one now before us.

We, therefore, reject the application with costs.

Application rejected.

(1) L. R. 1 Ch. D. 98.

Note.—Section 372 of the new Civil Procedure Code (Act X of 1877) seems intended to meet such a case as the above, but would not apply in the case of a suit instituted or appeal presented before 1st October 1877: see Act X. of 1877, sections 1 and 3.

APPELLATE CIVIL.

Before Mr. Justice Melvill and Mr. Justice Pinhey.

Sept. 12. JAGJIVAN NANABHAI (APPLICANT) *v.* SHRIDHAR BALKRISHNA NAGARKAR (OPPONENT).*

Injunction—Mortgage—Power of sale.

When property mortgaged is situated in the mofussal, but the parties to the mortgage are resident in Bombay, and the instrument of mortgage is in the English form, the parties must be held to have contracted according to English Law, and to be entitled to enforce their rights according to that law. In such a case the mortgagee can exercise a power of sale contained in the mortgage deed, and cannot be restrained from exercising such power merely because the mortgagor has filed a suit for redemption. The mortgagor can only stay the sale *pendente lite* by paying the amount due into Court, or by giving *primâ facie* evidence that the power of sale is being exercised in a fraudulent or improper manner, contrary to the terms of the mortgage.

THIS was an appeal from an order made by Ráv Báhádur Vishnu M. Bhide, Subordinate Judge of Thánâ, at Násik.

The facts of the case, in so far as they are material to this report, are as follows:—

On the 15th of June 1871 one Shridhar Bálkrishna Nagarkar, an inhabitant of Bombay, executed in the regular English form a deed of mortgage to Jagjivan Nanábhái, also of Bombay, mortgaging to the latter two salt-pans belonging to him and situated at Bombay, in the Thánâ District, for a sum of Rs. 9,000. On the

* Misc. Ap. No. 11 of 1877.

24th February 1872 a further sum of Rs. 2,000 was advanced on the security of the same property, and a second deed reciting the previous one was executed in the same form. Each of these deeds contained a clause giving to the mortgagee the power of selling the mortgaged property on the failure, by the mortgagor, to pay the amount due by a certain fixed time. On the 21st of February 1877 the mortgagee gave notice to the mortgagor of his intention to sell the property, unless a certain sum alleged by the mortgagee to be due to him from the mortgagor were paid at once. On the 17th of March 1877 the mortgagor filed a redemption suit, alleging that nothing remained due on the two mortgages, but that, if any sum were found to be due, he was ready to pay it, and at the same time prayed for an injunction to restrain the mortgagee from the exercise of his power of sale till the final disposal of his redemption suit.

To this prayer for an injunction the mortgagee at once objected, and urged that the mere institution of the suit, unaccompanied by an actual tender of the whole of the money advanced and laid out by the mortgagee upon the estate, together with the interest due thereon, or a deposit of the same in Court, afforded no sufficient ground for the issue of such an injunction.

The Subordinate Judge overruled this objection on the ground that it had been held in *Rhodes* v. *Buckland*[1] that a mortgagee could not sell the mortgaged property during the pendency of the suit, and observed that the value of the property seemed much greater than the sum likely to be found to be due in respect of the mortgages. He, therefore, granted the injunction as prayed.

The mortgagee applied to the High Court to set aside the injunction.

Macpherson (with him *Shivshanker Govindram*) for the applicant:—The case of *Rhodes* v. *Buckland*, relied on by the Subordinate Judge, does not decide that the mere institution of a redemption suit justified the Court in depriving the mortgagee of his power of sale. It is necessary that *primâ facie* evidence of fraud on the part of the mortgagee should be given.—Kerr

(1) 16 Beav. 212. (2) 16 Beav. 212.

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on Injunctions, 192. Fisher on Mortgages, 2nd ed., 501,268,277. *Adams* v. *Scott*.(1)

V.N. Mandlik for the opponent :—In *Keshavrav* v. *Bhavanji*(2) a doubt has been expressed as to the mortgagee's power of sale in the mofussal. Here the property intended to be sold is situated in the mofussal : *Pitambar* v. *Vanmali*.(3)

MELVILL, J. :—In *Keshavrav* v. *Bhavanji*(4) I have expressed a doubt whether, in the case of an ordinary mortgage in the mofussal, the mortgagee can exercise a power of sale given by the instrument of mortgage. In the present case, although the mortgaged property is situated a few miles out of Bombay, the parties are residents of Bombay, conducting their transactions through Bombay solicitors, and the instrument of mortgage is a regular and formal deed in English form. I think that in this case the parties must be held to have intended to contract with reference to English law, and to be entitled to enforce their rights according to that law, *Bholanath Coondoo Chowdry* v. *Unodapersad Ray*.(5)

The deed of mortgage between the parties contains a power of sale to be exercised after a previous notice to the mortgagor. Such a notice was given to the plaintiff on the 21st February 1877, and thereupon, on the 17th March, the plaintiff filed this suit to redeem, and obtained an injunction restraining the defendant from exercising the power of sale. The object of the present appeal is to set aside this injunction.

The Subordinate Judge appears to have granted the injunction on no other ground except that, as a suit for redemption has been filed, matters ought to remain *in statu quo* until the decision of the suit. The case of *Rhodes* v. *Buckland*(6) does not establish the proposition laid down by the Subordinate Judge, viz., that "a mortgagee cannot sell the mortgaged property under the terms of the mortgage-deed during the continuance of a suit for the redemption of the mortgage." In that case the Court did restrain the exercise of the power of sale ; but the case was a peculiar one, and the person seeking to redeem was not the mort-

(1) 7 W. R. 213. (2) 8 Bom. H. C. Rep. 142 A. C. J.
(3) I. L. R. 2 Bom. 1. (4) 8 Bom. H. C. Rep. 142 A. C. J,
(5) 1 Boulu. 97 ; see p. 101. (6) 16 Beav. 221.

gagor, but a puisne incumbrancer claiming to be entitled to pay off a prior mortgage. As a general rule, when a power of sale has become absolute, the exercise of the power cannot be suspended by the filing of a bill to redeem: *Adams* v. *Scott.* (1) If it could be so suspended, the mortgagee might be deprived of his remedy and kept out of his money for an indefinite time. The owner of the equity of redemption can only stay the sale *pendente lite* by paying the amount due into Court, or by giving *primâ facie* evidence that the power of sale is being exercised in a fraudulent or improper manner, contrary to the terms of the mortgage.

In the present case the plaintiff alleges that the mortgage debt has been fully satisfied: and if he could satisfy the Court that there are good *primâ facie* reasons for supposing that to be the case, the Court might properly restrain the sale. But the Subordinate Judge has not proceeded on that ground, nor is there any evidence at present on record which would have justified him in so doing. Neither is there anything to show that the defendant, in regard to the intended sale, is acting frudulently or oppressively, or contrary to the terms of the mortgage. The plaintiff's pleader wishes to put in evidence to show that in 1873 the defendant fraudulently endeavoured to have the equity of redemption sold under a decree obtained by a third party. That may be so; but it does not follow that there is any fraud in the defendant's present proceedings.

The plaintiff's allegation of full satisfaction of the debt appears inconsistent with the attempt which he makes to show that in 1873 and 1874 he tendered sums, amounting to more than Rs. 2,000, which were refused by the defendant. If tenders were made, and improperly refused by the defendant, the plaintiff might have brought his suit to compel the defendant to receive the money due to him, and to reconvey the property. He has admittedly done nothing since the date of the alleged tenders, and has not now paid into Court the money which he alleges that he then tendered, and which, if then due, must be due still.

Under these circumstances we must hold that the injunction complained of was issued on insufficient grounds, and must be set

(1) 7 W. R. 213.

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aside. The plaintiff will, of course, be at liberty to apply again for such an injunction, if he can make out a *primâ faice* case, showing that the debt has been fully satisfied, or if he pay into Court a sum which is *primâ facie* sufficient to discharge the debt. Costs on plaintiff.

PINHEY, J.—I would reverse the order of the Subordinate Court enjoining the defendant Jagjivan Nanábhái to refrain from exercising the power of sale given to him under his instrument of mortgage, pending the disposal of the suit brought by the mortgagor Shridhar Bálkrishna Nagarkar for the redemption of the property, as I consider that the injunction has been granted on insufficient grounds, and without any evidence being adduced sufficient to warrant the exercise of this extraordinary power of the Court. No witness was examined, nor was any affidavit filed, in support of the application for an injunction, and the only verified document on the record is the plaint. When a mortgagee has in pursuance of a power of sale given to him under his instrument of mortgage served the mortgagor with notice of his intention to exercise this power, the mortgagor is not entitled to file a suit for redemption, and then ask the Court for an injunction restraining the mortgagee from exercising his power of sale, unless fraud is charged against the mortgagee. To grant such an injunction would be to cancel one of the clauses of the deed to which both the parties had agreed, and to annul one of the chief securities on which persons advancing money on mortgage rely. It would, of course, be otherwise if the notice of sale had been given by the mortgagee after the suit for redemption had been filed.

The mortgagor is entitled to have the sale of the property suspended only if he can show either that he has paid off the mortgage lien, or that he has made a legal tender of the amount due which has been refused. In the case before us there is not even *primâ facie* ground shown at present for considering that the mortgage lien has been paid off. And as to a tender of payment having been made, the statements made in support of such are vague and unsatisfactory. So far as the record of the case throws any light on this point, it would appear that the tender or tenders said to have been made through Messrs. Hearn, Cleveland, and

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Peile were made before the expiration of the period for which the property was mortgaged, and were coupled with a condition that the defendant should, before receiving the money, execute an engrossed reconveyance simultaneously offered for his signature. This would not be a tender which the mortgagee would be bound to accept. Another tender is suggested, but not distinctly alleged. The mortgagor alleges that Rs. 9,864 were deposited with the sarkárkun, in whose jurisdiction the mortgaged salt-pans are, and that the money was returned by him, because the mortgagee did not receive it. There is no distinct allegation that this money was ever tendered to the mortgagee by the sarkárkun or by any one else, and refused. The plaintiff's pleader wishes us to infer that such a tender was made; but, in the absence of evidence, we can draw no such inference; and, as there is no reason shewn why the sarkárkun should have undertaken the duty of paying off the mortgage, if we are to infer anything, I should incline rather to the inference that the money was deposited with the sarkárkun, not that he might tender it to the mortgagee, but to secure the sarkárkun from the consequences of his act in letting the mortgagor cancel the power of attorney under which the mortgagee had up to that time been dealing with the produce of the salt-pans, and letting the mortgagor back into enjoyment of the salt-pans.

No sufficient grounds for the issue of the injunction granted by the Subordinate Court appear in this case, and I would, therefore, dissolve the injunction, and reverse the order of the Subordinate Court in this behalf. Costs of the injunction matter and of this appeal should be borne by the plaintiff Shridhar Balkrishna Nagarkar.

Injunction dissolved and order reversed.

[ORIGINAL CIVIL.]

Before Mr. Justice Green.

1877. August 10.

FRÀMJI BESANJI DUSTUR (PLAINTIFF) *v.* HORMASJI PESTANJI FRÀMJI (DEFENDANT).

(JAITHA DEVJI, PURCHASER AND APPLICANT.*)

Execution sale of moveable property—Sheriff—Execution-creditor—Warranty—Title—Act VIII of 1859, *ss.* 212, 249, 252, 256 *to* 258—*Indian Contract Act* (*IX of* 1872), *s.* 109.

A purchaser of property, whether immoveable or moveable, at a sale in execution of a decree under the Code of Civil Procedure, 1859, held in accordance with the provisions of that Code, has no right to recover his purchase-money, though it may turn out that the right, title, and interest of the execution-debtor was nothing at all, unless the sale itself be set aside, and the sale will not be set aside by reason merely of the defect or absence of title in the thing sold on the part of the execution-debtor; but, if there is an express assertion that the goods sold are the property of the execution-debtor, the Sheriff and the execution-creditor are bound by such warranty, to the extent, at least, that one of them, in whose hands the purchase-money is, is bound to restore it to the purchaser, if the purchaser has not got that for which he paid.

Section 258 of Act VIII. of 1859 applies wherever a sale is set aside, whether for irregularity in publishing or conducting a sale, or for other grounds; and, though the right of the purchaser to recover back his purchase-money, in case of the sale being set aside, is, by that Act, given expressly only where the sale is of immoveable property, yet the same consequence would follow where a sale of moveable property in execution has been set aside.

Where, therefore, certain shares were attached by the execution-creditor as the property of the execution-debtor, and were afterwards sold in execution by the Sheriff, and the execution orders and warrants and the Sheriff's proclamation of sale contained assertions of interest of the execution-debtor, in these shares, whereas he had no such interest.

Held, that the purchaser at the execution sale was entitled to have the sale set aside, and his purchase-money returned to him; but the Sheriff's liability to the purchaser in such a case ceases so soon as he has paid over the proceeds of the sale to the execution-creditor, and the purchaser's remedy thereafter is against the execution-creditor only.

Bank of Hindustan v. *Premchand Raichand* (5 Bom. H.C. Rep. 83 O. C. J.) commented upon.

Sheikh Mahomed v. *Sheikh Abdulla* (4 Beng. L. R. Appx. 35) distinguished.

THE applicant, one Jaitha Devji, the purchaser at an execution-sale, obtained a summons in chambers, calling on the execution-creditor at such sale to show cause why the sale should not be set aside and the purchase-money be returned.

* Suit No. 540 of 1876.

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Macpherson, for the applicant.

Inverarity, for the plaintiff.

The facts and arguments are stated, and the authorities cited fully considered, in the following judgment by—

GREEN, J. :—This matter arises on a summons, dated 19th July 1877, issued at the instance of one Jaitha Devji, calling on the plaintiff to show cause why a certain sale by the Sheriff of Bombay on 13th June last to the said Jaitha Devji as purchaser of three shares Nos. 2022, 2096, and 3005, of the New Colaba Company, Limited, should not be set aside and cancelled, and why the sum of Rs. 2,300, paid by the said purchaser to the Sheriff on the said 13th June as purchase-money of the said shares, should not be returned to the purchaser, and why the plaintiff should not pay the said purchaser the costs incurred by him concerning the said sale together with the costs of the application. In the meantime, the Sheriff was directed to retain the said sum of Rs. 2,300 till further order. Though the Sheriff is not a party to that summons, yet the Deputy Sheriff informed me he was aware of the same, but had no intention of showing any cause, and submitted to any order the Court might make.

On 14th Novem ber 1876, the plaintiff obtained a decree in this suit against the defendant for Rs. 6,272, with costs when taxed, and further interest. Previously to 15th February 1877 a sum of Rs. 480 was recovered in satisfaction, leaving a balance of Rs. 5,792, with costs and interest, unsatisfied. On the last-mentioned date an order was made, on the plaintiff's application, that the said decree should be executed to the extent of the said balance of Rs. 5,792, with further interest and costs, by the attachment of the shares held by the defendant above named in the New Colaba Company, Limited. In the schedule or application for execution on which this order was made the mode, in which the assistance of the Court was required was thus described—"by attachment of the shares held by the defendant in the New Colaba Company, Limited, in the name of Hormasji Pestnaji." Under this order a warrant of the same date was issued for

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attachment under sec. 212 of the Civil Procedure Code, (1) in which the property to be attached is described as "the shares held by the defendant in the New Colaba Company, Limited, in the name of the said Hormasji Pestanji." In this warrant, it will be observed, is introduced the word "*said*" before the name of Hormasji Pestanji, thus indicating the identity of Hormasji Pestanji with the defendant, whereas, for all that appeared in the application for execution and order thereon, the said Hormasji Pestanji, in whose name the shares were might have been a different person from the defendant. This warrant of attachment was executed on the same 15th February 1877 by the Sheriff in the ordinary way, by delivering a copy to the Secretary of the New Colaba Company and another to the defendant. Then on 6th April 1877 the plaintiff obtained an order for the issue of a warrant of sale of the property mentioned in four several certificates, three of the Prothonotary and one of the Sheriff, certifying that the property therein respectively mentioned had been attached in execution of the decree. One of those certificates related to "the shares held by the defendant in the New Colaba Company, Limited, in the name of the said Hormasji Pestanji." In the affidavit filed by the plaintiff on behalf of his application for issue of warrant of sale is contained this passage: "that the shares in the New Colaba Company, Limited, attached herein, under the warrant of attachment dated 15th February last, are, as I have ascertained, three in number, and are, respectively, numbered 2022, 2095, and 3005 in the said books of the said Company." The order for issue of warrant of sale of the several premises attached was accordingly made on the said 6th April 1877, and, *inter alia*, contained these words: "and that as regards the shares held by the defendant in the New Colaba Company, Limited, the respective numbers of the same as appearing in the said affidavit be specified in the warrant of sale. Then, by the warrant of sale issued under the last-mentioned order, and dated 7th April, the Sheriff was commanded to sell, in manner therein mentioned, "all the defendant's right, title, and interest only in the lands and premises aforesaid," which consisted of certain immoveable property of the defendant at Mahim,

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which had been also attached "and the defendant's said moveable property." Among the moveable property, besides the said shares of the New Colaba Company, were a share No. 89 in the Frámji Cowasji Patent Press Company, now in liquidation, and certain household furniture and effects. The description in the warrant of sale of the shares in the New Colaba Company is as follows:—"The shares Nos. 2022, 2095, and 3005, held by the defendant in the New Colaba Company, Limited, in the name of the said Hormasji Pestanji." The said Colaba shares, together with the share No. 89 in the Frámji Cowasji Patent Press Company, and the said immoveable property of the defendant at Mahim, were, on 13th June 1877, put up for sale by public auction by the Sheriff. The household furniture and effects were not, on this occasion, put up for sale. At this sale the applicant Jaitha Devji was declared the purchaser of the three shares of the New Colaba Company, Limited, Nos, 2022, 2095, and 3005, at the price of Rs. 2,300, which sum he, on the same day, paid to the Sheriff. In the advertisement or proclamation of this sale, after reciting the decree and the orders for execution thereof, the said shares had been described as "the shares Nos. 2022, 2095, and 3005, held by the defendant in the New Colaba Company, Limited, in the name of the said Hormasji Pestanji." The advertisement further announced that "the Sheriff will sell the defendant's right, title, and interest only in the lands and premises aforesaid," referring to the said immoveable property of the defendant, and "the defendant's said moveable property," referring to the shares before mentioned, as there is nothing else the words can refer to. It was also provided that the shares were to be paid for at the time of sale. The receipt given by the Sheriff for the purchase-money paid by Jaitha Devji, the purchaser, dated 13th June 1877, is as follows: "Received from Jaitha Devji the sum of Rs. 2,300 only, being the price of three shares, No. 2022, No. 2095, and No. 3005 in the New Colaba Company, sold to him this day in the above suit."

I have thought it desirable to set out at length the whole proceedings in execution in this case, in order to show, not only the precise state of circumstances in which the question for deci-

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sion has arisen, but also to show that the plaintiff here is ultimately responsible for every word of the description under which the Colaba shares were sold by the Sheriff.

By the certificate of the Sheriff, dated 16th June 1877, he certified that he had, on 13th June, sold to the said Jaitha Devji "the right, title, and interest of the defendant above named, of, in, and to the shares Nos. 2022, 2095, and 3005, held by the defendant in the New Colaba Company, Limited, in the name of the said Hormasji Pestanji."

Shortly afterwards, under an order of 19th June 1877, transfers of the said three shares to Jaitha Devji were executed by the Prothonotary in the name of Hormasji Pestanji Frámji, the defendant. The purchaser then took steps to have his name entered in the register of the New Colaba Company, in respect of the said shares, but the Secretary of the Company declined to do this without further inquiry, having regard to the fact that Jaitha Devji was not in possession of the certificates of the shares, and that the name in which the shares stood in the register was Hormasji Pestamji only; whereas the name of the defendant was Hormasji Pestanji Frámji, and the Secretary required evidence of identity of these persons to be given. Inquiries being made, it turned out that the Hormasji Pestanji, in whose name the shares were registered, was not the defendant, but was one Hormasji Pestanji, surnamed Montwalla, who had died some time ago, and that the shares then belonged to Awábái, his widow and executrix, though not registered in her name. It was stated orally at the hearing of the summons, but without contradiction, that the name as appearing on the register was Hormasji Pestanji, residing at Girgaum, the then residence of the defendant Hormasji Pestanji Framji being also, curiously enough, Girgaum. The fact that these shares did, at the time of attachment and sale, belong to the estate of Hormasji Pestanji Montwalla, and not to the defendant Hormasji Pestanji Framji, and that the latter did not hold them, and had no right, title, or interest over or in them, or any of them, seems to be undisputed between the parties to this summons, and is, at any rate, to be deemed to be established.

The argument on the summons had two branches, (1) as to the general law as to warranty of title on sale of personal property, and in particular on execution-sales by the Sheriff under English law, and (2) on the effect of the provisions of the Civil Procedure Code with regard to sales in execution of decrees of Indian Courts. On the first branch of the argument, so far as it was concerned with the general law, as to warranty of title on sales of goods and chattels, were cited the cases of *Morley* v. *Attenborough* (1) and *Chapman* v. *Speller*, (2) to which may be added a case very similar to the one last named, viz., *Bagueley* v. *Hawley*. (3)

The rule, or alleged rule, of English law, that there is no implied warranty of title on the sale of a chattel, has been, however, limited by so many exceptions, that, as Lord Campbell in *Sims* v. *Marryatt* (4) observed, the exceptions "well nigh eat it up." The last or one of the last cases in which the rule was discussed, was *Eichholz* v. *Bannister*.(5) In this case it was held that in the case of goods sold in an open shop or warehouse there is an implied warranty on the part of the seller that he is the owner of the goods, and the purchaser, in case he has had to give up the goods to the true owner, is entitled to recover the price as money paid upon a consideration which has failed. In fact, after the judgment in this last case, the alleged rule or doctrine must be considered to have a very precarious, or at least, limited, existence. Under Act IX of 1872 (the Indian Contract Act), however, the application of the English legal maxim of *caveat emptor* to a sale of goods seems, so far, at least, as concerns *title*, to be excluded. For, by section 109 of this Act, which was not referred to in argument, it is provided: "If the buyer or any person claiming under him is by reason of the invalidity of the seller's title deprived of the thing sold, the seller is responsible to the buyer or the person claiming under him for loss caused thereby, unless a contrary intention appears by the contract."

But, however the case may be with an ordinary bargain and sale of goods, and when the circumstance that it is a sale in execution of a decree does not come into consideration, it seems

(1) 3 Exch. 500. (2) 14 Q. B. 621. (3) L. R. 2 C. P. 625.
(4) 17 Q. B. 281; see p. 291. (5) 17 C. B. L. S. 708.

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pretty clear that, in the case of a sale by a Sheriff in execution in ordinary course, there is nothing from which, according to English law, any intention to warrant the title of the execution-debtor can be inferred; or, in other words, that a purchaser of goods, seized and sold in execution in ordinary course by the Sheriff, cannot recover the purchase-money he has paid, by reason that it turns out that the goods did not belong to the execution-debtor. The reason for this is thus put by Erle, C.J., in *Eichholz* v. *Bannister* (1): "The fact of the sale taking place under such circumstances" (*i.e.*, the case of the sale, by the Sheriff, of goods seized under a *fi. fa.*) "is notice to buyers that the Sheriff has no knowledge of the title to the goods, and the buyers, consequently, buy at their own peril. Many contracts of sale tacitly express the same sort of disclaimer of warranty." But if in a sale by the Sheriff there is not only no disclaimer of warranty of title, but even an express assertion that the goods are the property of the execution-debtor, I cannot see why the Sheriff and the execution-creditor (if responsible for such assertion) should not be held bound by such warranty, to this extent at least, that the Sheriff (if he has still in his hands the purchase-money) or the execution-creditor (if the money has been paid over to him) is bound to restore it to the purchaser, in case it has turned out that the purchaser has not got that for which he paid.

If, on the other hand, a sale in execution of a decree under the Code of Civil Procedure be held in accordance with the provisions of that Code, the question as to warranty by the Sheriff cannot arise, and this for the reason that, if the provisions of the Code and the ordinary practice be observed, the terms and conditions of sale will exclude the existence of any intention on the part of the Sheriff or the execution-creditor to undertake such responsibility.

The more important point, therefore, to be determined is the application of the provisions of the Code of Civil Procedure to the peculiar circumstances of the present case. On this branch of the argument, the cases cited were *Dhondu Naik* v. *Ramji Kakda*, (2)

(1) 17 C. B. N. S. 708. (2) 4 Bom. H. C. Rep. 114 A. C. J.

The Bank of Hindustan v. *Premchand Raichand*, (1) *Krishnapa Santu* v. *Panchapa Gurpadapa*, (2) *Sowdamini Chowdrain* v. *Krishna Kishor Poddar*, (3) *Sheikh Mahomed Basirulla* v. *Sheikh Abdulla*, (4) *Kalu Visaji* v. *Damodar Govind*, (5) and *Ram Tuhul Singh* v. *Biseswar Lall Sahoo*. (6) In all these cases, except the last, the question arose with respect to the sale of an interest in immoveable property. In the last case, the sale was of the interest of the judgment-debtor in the proceeds of a revenue execution-sale of certain lands of his after satisfying revenue claims. With the exception of *The Bank of Hindustan* v. *Premchand Raichand*, (7) as to which I shall remark more at length, all these cases tend in the same direction, and the principle may be considered to be established, that a purchaser of immoveable or moveable property, at a sale in execution of a decree under the provisions of the Civil Procedure Code (1859) has no right to recover his purchase-money, though it may turn out that the right, title, and interest of the execution-debtor was nothing at all, unless the sale itself be set aside, and, further, that the sale will not be set aside by reason merely of the defect or absence of title in the thing sold on the part of the execution-debtor.(8) Section 258 of the Code provides that "whenever a sale of immoveable property is set aside, the purchaser shall be entitled to receive back his purchase-money, with or without interest, in such manner as it may appear proper to the Court to direct in each instance." The two previous sections had provided a summary procedure for setting aside a sale on the ground of material irregularity, causing substantial damages in *publishing* or *conducting* the sale. But I apprehend that section 258 applies wherever a sale is set aside, whether for irregularity in publishing or conducting a sale, or for other grounds. But, as I think the authorities show, the mere fact

(1) 5 Bom. H. C. Rep. 83 O. C. J. (2) 4 Beng. L. R. 11 F. B.
(3) 9 Bom. H. C. Rep. 92. (4) 6 Bom. H. C. Rep. 258 A. C. J.
(5) 4 Beng. L. R. 35. Appx. (6) L. R. 2 Ind. Ap. 131.
(7) 5 Bom. H. C. Rep. 83 O. C. J.

(8) *Note.*—By section 313 of the present Civil Procedure Code (Act X of 1877) the purchaser at a sale of *immoveable* property is entitled to have the sale set aside on the ground that the person whose property purported to be sold had no saleable interest in it, but there is no such provision among the sections relating to the sale in execution of *moveable* property.

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that an execution-debtor whose interest, or supposed interest in land has been sold in execution has no interest, or no absolute interest, in such land, so that the purchaser cannot get possession of what he may have supposed himself to have bought, or has been evicted from it by reason of some title paramount to that of the execution-debtor, does not warrant the setting aside of the sale either for irregularity or otherwise, and there is no consequent right to recover back the purchase-money. Though the right of the purchaser to recover back his purchase-money in case of a sale being set aside is by the Code given expressly only where the sale is of immoveable property, yet there can, I apprehend, be no room for doubt on general principles that the same consequence would follow where a sale of moveable property in execution has been set aside. There is no provision in the Code that sales of moveable property shall in no case be set aside, but only (section 252) that no irregularity in the sale of moveable property under an execution shall vitiate the sale. In the case of moveable property, the sale on payment of the purchase-money becomes absolute at once, whereas in the case of immoveable property it becomes absolute only on confirmation by the Court after 30 days. But in neither case is the sale absolute in the sense that it cannot be set aside by regular suit if brought within a year: Act IX of 1871, schedule II, art. 14.

The case of the *Bank of Hindustan* v. *Premchand Raichand* (1) is by no means irreconcilable with the other authorities above cited, if we consider what was, in fact, decided, though, no doubt, the language of the Court in giving judgment is hardly to be reconciled with the principles recognized in the other cases. As this decision was one of this Court sitting in appeal, it is desirable, in order properly to appreciate it, to consider somewhat closely what, in fact, the suit was, and what were the issues before the Court whose judgment was under appeal. In execution of a decree for Rs. 1,12,003-15-11 which the Bank of Hindustan, who were defendants below, had recovered against one Candás Narrondás, the right, title, and interest of Candás Narrondás in certain immoveable

(1) 5 Bom. H. C. Rep. 83 O. C. J.

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property, the subject of the suit, and called the Telwady property, were on 22nd November 1866 sold by the Sheriff to one Ahmedbhai Habibhai, also a defendant below, for Rs. 56,300. The plaintiffs in the suit, Premchand Raichand and Tulsidás, Ramdás, alleged by their plaint that, in pursuance of certain directions contained in the will of one Bái Javervahu, deceased, and out of her estate, the said Candás Narrondás had, in June 1857, purchased the Telwady property, and in further pursuance of the said directions had executed in December 1863 a certain Gujerathi deed of trust, whereby he conveyed the Telwady property to the plaintiffs for the religious and charitable purposes therein mentioned. The suit is by the plaint expressed to be under section 246 of the Civil Procedure Code to establish the plaintiffs' title to the Telwady property, and the prayer of the plaint is that the plaintiffs may be declared, as against the defendant, Ahmedbhai Habibhai, to be absolutely entitled to the same. The defendant Ahmedbhai Habibhai, by his written statement, contended that the alleged conveyance of December 1863 was illusory and not *bonâ fide*, or, at any rate, was void, as being, in the circumstances there stated, voluntary and without consideration, that the property, when attached and sold in execution of the decree, was, in fact, the property of Candás Narrondás himself, and claimed that he (the said defendant) might be declared absolutely entitled to the said property. By the decree of the Court on the original hearing, dated 20th March 1868, it was declared that the plaintiffs were absolutely entitled, as trustees, under the trust-deed, dated 16th December 1863, to the said Telwady property as against the defendant Ahmedbhai Habibhai. On 6th August 1868 the decree of 20th March 1868 was confirmed by the Appellate Court, and on this occasion was delivered the judgment reported in 5 Bom. H. C. Rep. 83 O. C. J. Now, the plaint, though, no doubt, purporting to be instituted under section 246 of the Civil Procedure Code, did not ask that the sale be set aside, and in none of the issues raised on the respective parts of the defendants, the Hindustan Bank and Ahmedbhai Habibhai, nor in the separate memoranda of appeal filed by them respectively, nor in the arguments on appeal, so far as reported, is there a trace of the plaintiffs, or the defendant Ahmedbhai Habibhai, as purchaser

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having insisted that the sale to the latter of the property in execution of the decree against Candás Narrondás ought to be set aside and the purchase-money returned. On the contrary, the case throughout of the defendant Ahmedbhai Habibhai, the execution-purchaser at least, was that the sale was a good one, and that, at the time of the attachment and sale, Candas Narrondas was the real owner of the property. In considering, however, the contention of one of the appellants, the Hindustan Bank, that they had been improperly made parties to the suit, the then Chief Justice expressed himself as follows(1): "If that is the nature of the right (*i.e.*, under s. 246) and of the suit that is to be brought, the suit is practically one to set aside the sale already made, and to restore the parties to the position which they originally occupied. And if the right of the plaintiffs is established, the proper decree to be made is that the sale should be set aside. It is, therefore, impossible to say that the Bank is not a proper party. It is not now necessary to determine what is the proper course to be pursued by the purchaser in order to recover back the purchase-money. It may be that under section 258 in a properly-constituted suit the Court ought to direct the money to be restored. I give no opinion upon that; but it is quite clear that the object of the suit being to set aside the sale, the Bank is interested, and was properly made a party to the suit, and that no that point the learned Judge came to a correct conclusion." The other learned Judge who heard this appeal went somewhat further than this. He says(2): "As to the second point, I think that a suit under section 246 was intended to restore all parties to their former state. The section says the suit is to establish the plaintiff's right, and that right is clearly to have it declared that the property belongs to the plaintiff, and should not have been sold, and to have the sale, consequently, set aside. If so, all parties interested in the proceedings in execution must be affected by the judgment, and on this ground the Bank is a proper party to the suit. But I think the Bank was also properly made a party, to avoid multiplicity of suits. A question must arise between the execution-creditor and the purchaser. There must be an equity on the part of the latter to recover back his purchase-money, as the considera-

(1) 5 Bom. H. C. Rep. 93 O. C. J. (2) 5 Bom. H. C. Rep. 96 O. C. J.

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tion for it has failed. This depends on the general principles of equity, and it also appears that it is so under section 258 of the Code of Civil Procedure. That section, in my opinion, being general in its terms, applies to all cases in which a sale is set aside, and not merely when it is set aside by reason of some irregularity in the proceedings: and so it would appear to have been decided by the High Court in Calcutta."

It was, perhaps, scarcely necessary for the determination of any point in the case to express any opinion on the question whether, even supposing the suit to be one for the purpose, in effect, of setting aside the sale, there would be any right in the circumstances of the case, on the part of the purchaser to recover back his purchase-money. Nor, with all respect for the opinion of the learned Judges who delivered judgments, can I see that the suit was practically, and it certainly was not in form, a suit to set aside the sale. No doubt *in effect* the success of the plaintiffs would render that which the defendant Ahmedbhai had bought, or supposed himself to buy, at the sale of no value to him, but would not otherwise affect the sale itself. In the ordinary case of one who takes a conveyance from another who has not, as against some title, paramount, right to convey, being evicted under such title paramount, the eviction under such title paramount, no doubt, renders the conveyance to the person evicted of no effect. But by the eviction the conveyance is not set aside. It subsists for all purposes consistent with the title paramount, and in particular, for instance, for any remedy the person evicted may have on covenants for title. So that when it is considered what was really decided in the case, it does not appear to me to conflict with the other cases, though, as I have said, the language of the Court in giving judgment can in some respects hardly be reconciled with those other cases.

If, however, the provisions of the Code as to executions be observed, the present question cannot arise. If the orders for attachment and sale, and the warrants issued thereunder, purport to be merely for attachment and sale of certain property, describing it by, in the case of immoveable property, its area, boundaries, occupants, and the Collector's or municipal number; or, in the case

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of moveables, by nature, number, situation, or other means of identification; and if then the advertisement or proclamation, following section 249, announces that the sale extends only to the right, title, and interest of the defendant in the property specified therein, the sale in itself cannot, it seems to me, be impeached, nor can any claim on the part of the purchaser to have the purchase-money returned be maintained on the ground that the execution-debtor had no interest in the property, or not such an interest as the purchaser supposed. In the present case, had the property attached, ordered to be sold, and advertised to be sold, been described simply "three shares, Nos. 2022, 2095, and 3005, of the New Colaba Company, Limited, in the name of Hormasji Pestanji," and the advertisement contained the limiting words as provided in section 249 of the Code, the purchaser here would not, in my opinion, have had any ground to ask to have the sale set aside and his purchase-money returned. But where, as in the present case, the execution-creditor has caused or allowed to be introduced into the order for attachment, the warrant of attachment, the order for sale, the warrant of sale and, above all, in the advertisement or proclamation (and in all these documents the words were, as we have seen, introduced at his instance), words containing a statement that the property attached and sold in execution is the property of the defendant or that the latter is, in fact, interested in the same, then it appears to me that the Sheriff (who acts as vendor, under the order of the Court indeed, but at the instance and promotion of the execution-creditor), as well as the execution-creditor himself, is bound by such statement or assertion of title contained in the very terms of sale, just as any ordinary vendor, even apart from section 109 of the Indian Contract Act would be. I do not, of course, mean that there would be any personal liability of the Sheriff, who merely executes orders and process of the Court which contain such assertions of title. But I apprehend that so long as the Sheriff has in his hands the purchase-money, the proceeds of a sale, which a purchaser, by reason of the assertion of the execution-debtor's title contained in the warrants and advertisement of sale being untrue, is entitled to have set aside, the purchaser may require the Sheriff to restore such proceeds. If, however, the proceeds

have been paid over to the execution-creditor, I apprehend the Sheriff would be no longer liable for them to the purchaser, as he (the Sheriff) has only acted in obedience to the orders of the Court; and the only remedy, if any, of the purchaser would be against the execution-creditor. The question as to the rights and remedies of the true owner of property which has been taken in execution and sold under decree passed against some person other than such true owner, does not here arise, as the executrix of Hormasji Pestanji, the true owner of these three shares, is not a party to this summons. That question, however, I may observe, is fully discussed in *Vana Jagannathji v. Hata Dipaji.*(1) There is, however, a passage in the judgment in that case by which one part of the present decision receives support, "his (*i.e.*, the judgment-creditor's) liability must depend upon the circumstances of the case, *i.e.*, upon the fact whether the wrongful seizure or the injury is the result of his own conduct: for instance, if the judgment-creditor personally or by his authorized agent (*e.g.*, his pleader) apply under section 214 of the Civil Procedure Code for the attachment of property which is specially designated in that application, and if the Court grant its warrant for the seizure of that particular property, and the officer of the Court execute that warrant, and the property be not that of the judgment-debtor, the judgment-creditor would certainly be liable for that wrongful seizure, and the officer of the Court, on the other hand, could justify under the warrant of the Court, and would not be liable so long as he kept within the duty expressly prescribed for him by that warrant." The point on which it appears to me this judgment affosds support to the present decision, is that, on the one hand, the judgment-creditor is liable for the consequences of the process (if wrongful) of the Court put in motion by him; and that for the Sheriff, who merely executes it according to its tenor, no personal liability arises.

There are in the present case, in the advertisement or proclamation (which contains the conditions on which the purchaser bought), two assertions of title which are, in fact, false,—one that the shares were "held by the defendant," and the other that they

(1) 11 Bom. H. C. Rep. 46.

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were "in the name of the *said* Hormasji Pestanji" (*i.e.*, of the defendant); the fact being that the shares in question were not held by the defendant, and were not in the name of the *said* Hormasji Pestanji (*i.e.*, the defendant), but of another Hormasji Pestanji who had died some time before. It would lead to very injurious results if execution-creditors were to be allowed to have statements introduced into the advertisement or proclamation of sale as to the title and extent of the interest of the execution-debtor, and then having secured the money realized by the sale on such terms, should be allowed to say to the purchaser: "You only bought the right, title, and interest of the defendant and cannot complain that you get nothing, though I had caused you to be assured, in solemn form when you bought, that he had something." The assertion of title in the execution-debtor in the property attached altogether gets rid of the effect of other provisions in section 249 of the Code, that the sale is to be announced as being only of the right, title, and interest of the defendant for the purposes for which those provisions were intended to operate; and the execution-creditor in the present case, in fact, makes the Sheriff say: "I only sell the right, title, and interest of the defendant, but at the same time I tell you he has an interest." For the reason, therefore, that the execution orders and warrants and the advertisement contain assertions of interest of the execution-debtor in the property sold, whereas the execution-debtor had no such interest, I am of opinion that the purchaser is entitled to have the sale set aside and his purchase-money returned to him. I have not omitted to notice that in one of the cases cited, viz., that in 4 Beng. L. R. Appx. 35, there was the same circumstance as exists here, viz., an assertion on the part of the execution-creditor that the property sold was the property of the judgment-debtor. But that case differs from the present in the all-important particular that the execution-creditor there had himself become the purchaser under the execution, and had set off the purchase-money against his decree, so that if there was any warranty of title the warranty consisted in his own assertion made to himself. His application to have further execution of the decree without taking into account what had been ordered to be set off against his decree, viz., the purchase-money, was very properly refused.

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The order on this summons will be that the sale mentioned in the summons be set aside, and that the Sheriff do repay to the applicant Jaitha Devji the sum of Rs. 2,300 mentioned in the said summons, less any deductions which the Sheriff may be entitled to retain for poundage expenses or otherwise, and that the plaintiff do pay to the applicant his costs of and incident to this summons, together with the amount of the deductions, if any, which the Sheriff may have made in respect of poundage expenses, or otherwise. As to the costs suggested to have been incurred by the applicant concerning the said sale, and also asked for by the summons, he has given no evidence what they were, and they are not of a nature, so far as appears, that they might be referred for taxation; so as to this part of the summons I make no order. Nor do I make any order as to interest, for the reasons that the power of giving interest in such a case exists under the Code only where a sale of immoveable property is set aside, and also that by the summons no interest is asked for.

Order accordingly.

[ORIGINAL CIVIL.]

Before Mr. Justice Green.

JULY 30.

RAJU BALU (PLAINTIFF) *v.* KRISHNARAV RAMCHANDRA AND ANOTHER (DEFENDANTS).*

Registration—Act III. of 1877—*Evidence—Covenant—Patent ambiguity—Title—Estoppel—Cause of action—Damages—Consideration—Limitation.*

S. L., by a deed of gift of 16th February 1847, granted and assured to S., his daughter, certain immoveable property. By a subsequent unregistered deed of gift of 15th July 1865, S. L. purported, in consideration of natural love and affection, to grant and convey the same property, the value of which exceeded Rs. 100, to B. R., the husband of S., his heirs, executors, administrators, and assigns. The last-mentioned deed contained covenants, on the part of S. L., his heirs, executors, and administrators, with B. R., his heirs, executors, administrators, and assigns, for title to "the hereditaments and premises hereinbefore expressed to be hereby granted and assured unto and to the use of the said B. R., his heirs, executors, administrators, and assigns." S. died in the lifetime of B. R., who, in 1867, mortgaged the premises comprised in the deed of 15th July 1865, and died in 1868. In

* Suit No. 258 of 1877.

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1870 the mortgagee sold the premises by auction, under the power of sale contained in the mortgage-deed; the plaintiff became the purchaser, and the mortgagee, on 24th March 1871, executed to him a conveyance of the premises, which were then in the possession of the surviving members of the family of B. R. and S. The plaintiff having failed in a suit in ejectment against the parties in possession, who relied on the prior gift to S., sued the representatives of S. L. for damages for breach of the covenants for title contained in the unregistered deed of 15th July 1865.

Held, 1*st*, that the provisions of Act III. of 1877 apply to all documents tendered in evidence on or after 1st April 1877.

2*nd*, that though, as in *Tukárám* v. *Khandoji* (6 Bom. H. C. Rep. 134 O. C. J.) and *Sangáppá* v. *Basáppá* (7 Bom. H. C. Rep. 1 A. C. J.), an unregistered document requiring registration may be admitted in evidence for certain purposes, yet it cannot be looked at so far as it affects the immoveable property comprised therein, nor so far as it is evidence of any transaction affecting such property, and that, excluding the part of the document of 15th July 1865 which purported to be the conveyance to B. R., the covenant for title sued on in the present suit was itself ambiguous and uncertain; and there being nothing to connect the premises to which the covenant related with the premises conveyed to the plaintiff, no breach of the covenant sued upon had been proved.

3*rd*, that a covenant for title, running with the land, would seem to be in itself a transaction affecting the land, and that the instrument containing it, if coming within clauses (*a*) to (*d*) of s. 17 of Act III. of 1877, must be registered, unless it comes within the exceptive clauses (*e*) to (*l*) of the same section.

4*th*, that a document containing covenants for title, though, no doubt, embodying "a transaction affecting immoveable property," is admissible in a suit for damages for breach of such covenants, provided the document conform to the requirements of the exceptive clauses of s. 17 of Act III. of 1877; but where, as in the present case, the evidence of the covenant is contained in a document *itself* purporting to assign an interest in immoveable property—the covenant being ambiguous and uncertain without reference to such assignment—the document is not excepted from the necessity of registration.

5*th*, that the Court being precluded by the operation of the Registration Act (III. of 1877) from looking at the deed of 15th July 1865 so far as it was a conveyance, the defendants were not estopped from contending that nothing having passed under it to B. R., nothing had passed to the plaintiff under the subsequent deeds, and that, consequently, the plaintiff was not entitled to maintain this suit.

6*th*, that, though under the English law damages may be recovered for breach of covenants for title contained in a voluntary settlement of such a character as to be ineffectual without the assistance of a Court of equity, and which assistance a Court of equity would refuse to a volunteer, yet this, depending on the principle of English law that a document sealed and delivered imports consideration, which principle does not hold as between Hindus, it was open to the defendants in the present case to show that the plaintiff was suing on a contract for which there was no consideration other than natural love and affection, which cannot be made the ground of a suit for damages.

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7th, that the breach of the grantor's covenant, so far as related to his present right to convey, took place on the day the conveyance to the covenantee was executed, viz., 15th July 1865, and, consequently, a suit in respect of such breach was barred; but the covenant for quiet possession, admitting of a continuing breach, was not barred so long as the breach continued, and that of the covenant for further assurance there had been no breach at all, as such covenant would be broken only by refusal on the part of the covenantor or his representatives to execute a further assurance when required so to do by the covenantee or his representatives.

SAKHÁRAM LAKSHMANJI, by a deed of gift dated 16th February 1847, granted and assured to his daughter, Shámábái, certain immoveable property situated in Lohár Chál Street in Bombay. By a subsequent deed of gift of 15th July 1865, purporting to have been executed in consideration of natural love and affection, he affected to grant and convey the same property, the value of which greatly exceeded Rs. 100, to Bhagvantráv Rámchandra, the husband of Shámábái, his heirs, executors, administrators, and assigns. This deed, which was never registered, contained covenants for title by Sakhárám Lakshmanji, for himself, his heirs, executors, and administrators, to Bhagvantráv Rámchandra, his heirs, executors, administrators, and assigns. The premises, however, to which these covenants related, were not described in the covenants otherwise than by reference to the conveyance contained in the previous part of the deed.

Sakhárám Lakshmanji died in 1865. Shámábái died in 1855, and before her husband Bhagvantráv, who died in 1868, after having, in 1867 and 1868, executed deeds of mortgage and further charge of the premises in Lohár Chál Street comprised in the two deeds of the 16th February 1847 and the 15th July 1865 to one Shrikrishná Náráyen. Default having been made in payment of the mortgage-moneys and interest, Shrikrishná Náráyen, under the powers of sale contained in the deeds of mortgage and further charge, sold the mortgage premises by auction in 1870, and the plaintiff became the purchaser at such auction. By conveyance of 24th March 1871 Shrikrishná Náráyen conveyed to the plaintiff the mortgaged premises, which were then in the possession of the representatives of Bhagvantráv Rámchandra and his wife Shámábái. Against these persons the plaintiff, in 1872, filed a suit in ejectment to recover possession of the premises so purchased by

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him. The defendants in that suit relied on the prior gift to Shámábái. The deed of gift of 16th February 1847 had been lost; but, secondary evidence of the gift having been admitted, the title of the defendants was upheld, and the suit dismissed. The plaintiff then filed against the representatives of Sakhárám Lakshmanji the present suit to recover damages sustained by reason of the breach of the covenants for title contained in the deed of 15th July 1865.

Gill and *Kirkpatrick* for the plaintiff.

Marriott, Advocate-General (Acting), *Latham*, and *B. Tyabji* for the defendants.

The facts of the case and the arguments are fully stated in the following judgment delivered by

GREEN, J.:—The plaintiff, in the character of assignee of certain immoveable property in Lohár Chál Street in Bombay, claims as against the defendants, the surviving heirs of one Sakhárám Lakshmanji, who died on or about 27th October 1865, to recover damages for the breach of certain covenants for title contained in a certain instrument, purporting to be an indenture and under seal, dated 15th July 1865, and expressed to be made between the said Sakhárám Lakshmanji, of the one part, and one Bhagvantráv Rámchandra, of the other part. The plaint alleges that, by this indenture of 15th July 1865, the said Sakhárám Lakshmanji granted and conveyed to the said Bhagvantráv, his heirs, executors, administrators, and assigns, the said premises in Lohár Chál Street. The plaint also alleges that at the time of the execution, by Sakhárám Lakshmanji, of the indenture of 15th July 1865, the said premises were, and had been by a deed of gift bearing date 16th February 1847, and executed by the said Sakhárám Lakshmanji, granted and assured by the said Sakhárám Lakshmanji to Shámábái, the wife of the said Bhagvantráv Rámchandra, and daughter of the said Sakhárám Lakshmanji, absolutely, and that a copy of the said deed of gift was thereto annexed and marked E.

By the allegations of the plaint and the documents put in evidence it further appears that by two indentures of mortgage, dated, respectively, 6th August 1867 and 1st September 1868, and

expressed to be made between the said Bhagvantráv Rámchandra of the one part, and one Shrikrishná Náráyen of the other part, in consideration, respectively, of the sums of Rs. 25,000 and Rs. 10,000, expressed to be advanced by the said Shrikrishná Náráyen to the said Bhagvantráv Rámchandra, the latter purported to convey and charge the said premises in Lohár Chál Street to or in favour of the former, to secure repayment of the said advances with interest as therein mentioned.

The said Bhagvantráv Rámchandra, as the plaint alleges, died on 26th October 1868.

The said mortgaged premises were, on 28th October 1870, by virtue of the power of sale contained in the said mortgages, put up to sale by public auction by the mortgagee Shrikrishná Náráyen, and at such sale the plaintiff was declared the purchaser thereof at the price of Rs. 25,000, and by an indenture of conveyance dated 24th March 1871, and expressed to be made between the said Shrikrishná Náráyen, of the one part, and the plaintiff, of the other part, and to be in consideration of such sum of Rs. 25,000, paid as therein mentioned, the said mortagaged premises were expressed to be conveyed to the plaintiff. Neither Shrikrishná Náráyen nor the plaintiff ever had possession of the premises, and the plaint alleges that, at the time of the execution of the conveyance of 24th March 1871, one Báláji Bhagvantráv (who was the survivor of the two sons of Bhagvantráv Rámchandra by his wife Shámábái, the daughter of Sakhárám Lakshmanji), one Sonábái, one Shámráv Bábáji, and one Rámráv Bábáji (respectively the widow and sons of one Bábáji Bhagvantráv, who was the other son of Bhagvantráv Rámchandra by Shámábái, but who had died since his father's death) were in possession of the said premises. Shámábái herself had, it appears, died in the lifetime of her husband Bhagvantráv Rámchandra, and before 26th October 1868.

In the year 1872 the present plaintiff instituted in this Court suit No. 157 of 1872 against the said Báláji Bhagvantráv and Sonábai, against one Sundrábái (widow of one Sakhárám Mádhavji), and against the said Shámráv Bábáji and Rámráv Bábáji, for the recovery of possession of the said premises, the

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said plaintiff claiming to be entitled to the same under the conveyance of 24th March 1871. In this suit the defendants Shámráv and Rámráv appeared by counsel, the defendant Báláji Bhágvantráv in person, and the defendants Sonábái and Sundrábái did not appear at all. Sonábái, it may be mentioned, was the mother of the defendants Shámráv and Rámráv, and Sundrábái was their aunt, being a daughter of Bhagvantráv Rámchandra. By the decree of the Court in suit No. 157 of 1872, dated 2nd August 1873, judgment was passed for the defendants in that suit, and the costs of the defendants Shámráv and Rámráv, amounting to Rs. 2,234-0-1, were ordered to be paid by the plaintiff therein.

The plaintiff Ráju Bálu then appealed against the decree of the 2nd August 1873; but by the decree of the Appellate Court, of 1st April 1875, the decree appealed from was affirmed with costs.

The plaint in the present suit also alleges that suit No. 157 of 1872 was dismissed on the ground that the defendants therein were entitled to the said premises under the aforesaid gift of 16th February 1847, and that by reason of the said gift no estate or interest in the said premises passed, under the said indenture of 15th July 1865, to the said Bhagvantráv Rámchandra, his heirs or assigns.

The covenant contained in the indenture of 15th July 1865, on which this suit is founded, is as follows:—"And the said Sakhárám Lakshmanji doth hereby for himself, his heirs, executors, and administrators, covenant with the said Bhagvantráv Rámchandra, his heirs, executors, administrators, and assigns, that notwithstanding any act, deed, matter, or thing by him the said Sankhárám Lakshmanji, or any of his ancestors or testators, done, omitted, or knowingly suffered, he the said Sankhárám Lakshmanji now hath power to grant, convey, and dispose of the hereditaments and premises hereinbefore expressed to be hereby granted and assured unto and to the use of the said Bhagvantráv Rámchandra, his heirs, executors, administrators, and assigns, and that the same premises shall from time to time and at all times hereafter remain and be to the use of the said Bhagvantráv Rámchandra, his heirs, executors, administrators, and assigns, and be jointly (*sic*) entered into and upon and held and enjoyed, and the rents and profits received

and taken by him and them accordingly without any interruption or disturbance by the said Sakhárám Lakshmanji or any person claiming through, under or in trust for him or any of his ancestors or testators, and that free and discharged or otherwise by him the said Sakhárám Lakshmanji, his heirs, executors and administrators sufficiently indemnified against all estates, incumbrances, claim and demand created, occasioned or made by the said Sakhárám Lakshmanji, his ancestors and testators or any person claiming through, under or in trust for him, them or any of them, and further that he, the said Sakhárám Lakshmanji and every person having or claiming any estate or interest in the said hereditaments and premises hereby granted and assured or expressed or intended so to be through, under or in trust for him or any of his ancestors or testators, will at all times hereafter at the cost of the said Bhagvantráv Rámchandra, his heirs, executors, administrators or assigns, make, execute and do every such assurance and thing for the further or more perfectly conveying, assigning and assuring all or any of the said hereditaments and premises hereinbefore expressed to be hereby granted, conveyed, assigned and assured unto and to the use of the said Bhagvantráv Rámchandra, his heirs, executors, administrators or assigns, as by him or them or his or their counsel in the law shall be reasonably desired, advised or required."

The plaint prays by way of damages for the alleged breach of the covenant for title set out as aforesaid to recover from the defendants herein, as heirs of Sakhárám Lakshmanji, the sum of Rs. 25,000, the consideration money of the conveyance to the plaintiff of 24th March 1871, with interest at 13½ *per cent. per annum*, and the sum of Rs. 10,550, the alleged amount of costs incurred by the plaintiff in prosecuting suit No. 157 of 1872.

The written statement of the defendants in the present suit, amongst other grounds of defence not necessary to be specified, alleges in para. 7 that the said Bhagvantráv Rámchandra and Shrikrishná Náráyen, as well as the plaintiff himself, had full and complete notice that the said Sakhárám Lakshmanji had, previously to the said alleged indenture of 15th July 1865, made a valid and effectual gift (*i.e.*, by the instrument of 16th February

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1847) of the said property to his daughter Shámábai and her heirs, and that, therefore, the said Sakhárám Lakshmanji had not, at the date of the said indenture, any right to make a gift of the same to the said Bhagvantráv Rámchandra.

The issues settled were as follows:—

(1). Whether any and what estate passed to Bhagvantráv Rámchandra under the deed of 15th July 1865.

(2). Whether Sakhárám Lakshmanji covenanted with Bhagvantráv Rámchandra as in the plaint alleged.

(3). Whether there was any and what consideration for the said deed or covenant therein contained.

(4). Whether the plaintiff is a purchaser for valuable consideration, without notice, of the property comprised in the said indenture.

(5). Whether the plaintiff is entitled, as assignee of Bhagvantráv Rámchandra, to maintain this suit.

(6). Whether the plaintiff is entitled to recover from the defendants the costs of suit No. 157 of 1872.

(7). Whether the plaintiff is entitled to recover any and what damages from the defendants in respect of the matters alleged in the plaint.

And (8) whether the suit is barred by the Limitation Act.

The first question which arose at the hearing was as to the admissibility in evidence, having regard to the provisions of the Indian Registration Act, 1877 (Act III. of 1877), of the document of 15th July 1865. This Act, though it came into force only on 1st April 1877, does not contain any provision, as is frequently the case with Acts of a similar nature, exempting from its operation documents executed previously to the date of its coming into force. On the contrary, it requires by section 17 the registration of all documents of the classes described in clauses (*a*), (*b*), (*c*), and (*d*) of that section (subject to a proviso as to leases, not necessary to be mentioned, and subject to the exceptions mentioned in clauses (*e*) to (*l*) of the same section, both inclusive) executed on or after the date on which the Act itself should come into force, or on which

the previous Registration Acts, viz., Act XVI. of 1864, Act XX. of 1866, or Act VIII. of 1871, had come into force.

Though section 18 of Act III. of 1877, as compared with section 18 of Act VIII. of 1871, extends the class of documents which *may* be registered—in fact *all* documents either *must* or *may* be registered under the present Act—yet the exceptions from the necessity of registration are, under section 17 of Act III. of 1877, in some respects larger than were those under section 17 of Act VIII. of 1871. To this extent the greater strictness of the requirements of Act VIII. of 1871 and the earlier Registration Acts has been mitigated, and the Act was framed as it is, very probably with a view to admit to the benefit of such mitigations documents though executed before the day on which the Act came into force. The practical result is, that the provisions of Act III. of 1877 apply to all documents tendered in evidence on or after 1st April 1877.

The sections, then, of the Act applicable to the question arising in the present case are sections 49 and 17. By the former it is provided that "no document required by section 17 to be registered, shall affect any immoveable property comprised therein, or confer any power to adopt, or be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered in accordance with the provisions of this Act." Now, section 17 requires the registration of, *inter alia*, "(*a*) instruments of gift of immoveable property; (*b*) other non-testamentary instruments which purport or operate to create, declare, assign, limit, or extinguish, whether in present or in future, any right, title, or interest, whether vested or contingent, of the value of Rs. 100 or upwards, to or in immoveable property; (*c*) non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation, or extinction of any such right, title, or interest." The mitigations introduced by the present Act, as compared with Act VIII. of 1871, consist in this, that the operation of clauses (*b*) and (*c*) is by the subsequent clauses (*e*) to (*l*) excluded from a wider class of documents than were excluded by clauses (*a*) to (*e*) in section 17 of Act VIII. of 1871 from the operation of

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clauses (2) and (3) of section 17 of that Act, which clauses (2) and (3) were in substance the same as (*b*) and (*c*) of section 17 of the present Act.

One of the mitigations of the present Act is, that clauses (*b*) and (*c*) of section 17 of that Act do not apply to (see clause (*h*) of the same section) "any document not itself creating, declaring, assigning, limiting, or extinguishing any right, title, or interest of the value of Rs. 100 and upwards to and in immoveable property, but merely creating a right to obtain another document which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest." The exception of documents of the class described in clause (*h*) of section 17 of Act III. of 1877 from the requirement of being registered in order to be admissible in evidence, having regard to section 49 of Act III. of 1877, is not to be found in Act VIII. of 1871, and is a relaxation or mitigation of the law as thereby established.

The indenture of 15th July 1865 on being tendered in evidence on the plaintiff's part was objected to on the part of the defendants as not having been registered. There can be no doubt that the instrument, taking it as a whole, is one which under section 17 of Act III. of 1877 is required to be registered. It purports to be a gift and grant of the premises in Lohár Chál Street by Sakhárám Lakshmanji to Bhagvantráv Rámchandra, his heirs, executors, administrators, and assigns, the consideration expressed being "the love and affection which the said Sakhárám Lakshmanji hath for his son-in-law Bhagvantráv Rámchandra, and also for divers other good considerations him thereunto surviving (*sic*)." Then follows the covenant for title already set out. No valuable consideration being expressed, and none such having been proved, the instrument is included in the operation of section 17 of the Act as being an instrument of gift of immoveable property; or if there can be any room for doubt, notwithstanding what is expressed on the face of the deed itself, as to its gratuitous or donative character, it is an instrument creating or assigning a right, title, or interest to or in immoveable property which independent evidence shows to have been of the value of upwards of Rs. 100. If so, its admission in evidence for the purpose of proving any conveyance

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to a predecessor in title of the plaintiff, is forbidden by section 49 of the Act, as the document on production is an instrument purporting to affect the immoveable property comprised therein. The admissibility of the document in evidence was, however, pressed on the ground that it was tendered and sought to be used only as containing a covenant for the breach of which damages were claimed, and the case of *Tukárám Vithoji* v. *Khandoji Malhárji*[1] and *Sangáppá Ningáppá* v. *Basáppá Páráppá*[2] decisions of this Court, were relied on. In those cases a bond for the payment of money was admitted in evidence in a suit for payment of the money, though not registered, and though the document also contained a mortgage of immoveable property to secure such re-payment. Those decisions were with reference to section 49 of Act XX. of 1866, the words of exclusion in which are much more express and unqualified than those of section 49 of Act VIII. of 1871, or of section 49 of the present Act. I considered at the time that the document in question, though unregistered, was admissible, and admitted it as evidence of a covenant for the breach of which damages are sought, though the document was to be treated as non-existent, or rather as not in evidence, so far as it purported to affect the immoveable property comprised therein, or to afford evidence of any transaction affecting such property.

It had been also contended that the indenture of 15th July 1865 could be treated as admissible in evidence *for all purposes*, though not registered, by reason that it was recited and confirmed by the will or codicils, or one of them, dated 12th August 1865, 14th August 1865, and 2nd October 1865, of Sakhárám Laskhmanji, and so, in fact, formed a part of the will and codicils themselves, which do not require registration. I do not find that the will and codicils of Sakhárám Lakshmanji were put in evidence on the part of the plaintiff, and cannot, therefore, judge what were the precise words in which this alleged recital and confirmation were embodied. But, taking the effect of the will and codicils to be as alleged in the plaint, I am unable to see how by his will a man *can* confirm a conveyance *as a conveyance*. He may, no doubt, so refer in his will to an ineffectual or inoperative conveyance as

(1) 6 Bom. H. C. Rep. 134 O. C. J. (2) 7 Bom. H. C. Rep. 1 A. C. J.

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to constitute a devise of itself; but, then, the property passes by devise; the conveyance so referred to does not acquire any greater force or effect *as a conveyance*. In the present case, the devise, if any there were, would be in itself as inoperatve as the conveyance which it is contended it had the effect of confirming, and this for the reason that, by the plaintiff's own case, the testator had no power to devise this property, having already conveyed it by the deed of gift of 16th February 1847. I do not consider that the alleged reference to, and confirmation of, the deed of 15th July 1865 by the subsequent will of Sakhárám Lakshmanji in any degree gets over the difficulty of treating the former document as in evidence as a conveyance, owing to its want of registration.

Now, though this deed of 15th July 1865 may have been admitted in evidence for some purpose, that will not, of course, prevent the Court from considering, and, in fact, the Court is bound to consider, how far the law allows it, though in such manner admitted in evidence, to be used as evidence for other purposes. We cannot look at it so far as it affects the immoveable property comprised therein, nor so far as it is evidence of any transaction affecting such property. In fact, the only part of the document we can look at is the description of the parties, the covenants for title, and the *testatum*. But, confining our attention to these parts only, and excluding the part which purports to be the conveyance to Bhagvantráv Rámchandra, the document is, it seems to me, as was contended by the defendants' counsel, without sense, and unintelligible. For instance, the covenant throughout has reference to some hereditaments and premises thereby granted and conveyed or expressed or intended so to be. But the document being unregistered, the Court is bound to consider that it did not affect and, of course, did not convey the mmoveable property comprised therein, and is bound not to recognize any expression of intention to affect such immoveable property. Nor has the Court any means of ascertaining what these hereditaments and premises so referred to are, for to do so would be to look at the part of the deed (and so in effect treat it as evidence) containing or purporting to contain the conveyance. This being so, the covenant is patently ambiguous and uncertain as to its subject matter, and there is nothing

to connect the hereditaments and premises, to which the covenant relates, with the hereditaments and premises conveyed to the plaintiff by the deed of 24th March 1871, or with those as to which the breach of covenant is alleged. If this be so, not only is no breach of the covenant sued upon, proved, but the covenant sued upon is in itself ambiguous and uncertain.

Then, the absence of registration seems to involve this difficulty in the plaintiff's way, having regard to the position of the plaintiff suing as alleged assignee. The right of a subsequent assignee of land to sue on a covenant for title by a former assignor is based on the principle that such a covenant, as it is said, runs with the land, as being something relating to, touching, or concerning the land. But if the ground of admitting an assignee to sue on such a covenant is that it relates to, touches, or concerns the land, then the question arises,—is not such a covenant in itself a transaction affecting the land, within the words of section 49 of the Act? If such a covenant is in itself a transaction affecting the land, it would seem that the instrument containing it, if coming within clauses (*a*), (*b*), (*c*), or (*d*) of section 17, must be registered before it is admissible in evidence for the purpose of proving the existence of such covenants, unless it comes within the exceptive clauses (*e*) to (*l*), and in particular within clause (*h*). If, however, the document containing the covenant for title be a document conforming to the description of the exceptive clause (*h*), though it may be a document tendered as evidence of a transaction affecting land, is, it seems to me, admissible in evidence without registration. The case of *Váláji Isáji* v. *Thomas*[1] was cited by defendants' counsel in aid of his argument, that the document ought not to be admitted in evidence for any purpose. In that case the Court upheld the decision of the Judge below, that in a suit for specific performance of an agreement to execute a deed of sale of certain immoveable property on the terms therein mentioned, the agreement was not admissible in evidence owing to want of registration, and that the suit ought to be dismissed. The case was decided with reference to clauses (2) and (3) of

(1) I. L. R. 1 Bom. 190.

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section 17 of Act VIII. of 1871, which, as I have stated, are in substance the same as clauses (*b*) and (*c*) of the present Act, and on the ground that a document acknowledging the receipt of Rs. 100, part of the consideration money, though contemplating the execution, *in futuro*, of a deed of sale, did operate of itself to create an interest in the property of the value of Rs. 100 and upwards, and therefore, under the clauses cited, required registration. It does not seem to me that the decision would have been other than it was, having regard to the nature of the particular agreement in question there, had the present Act, with the extended exceptive clauses of section 17, been applicable to that case. But I am of opinion that there is nothing in that decision to interfere with the proposition, having regard to clause (*h*) of section 17 of the present Act, that in a suit for specific performance of an agreement for the sale of land, the agreement may be admitted in evidence if it does not itself create, declare, &c., any right, title, or interest of the value of Rs. 100 and upwards to or in immoveable property by the acknowledgment of the receipt or payment of any consideration on account of the creation, declaration, &c., of a right, title, or interest in the land. No doubt a consideration would be necessary, though, if consisting in future payment, or otherwise so as not to be an acknowledgment of a receipt or part payment, and thus have an operation in itself as creating, declaring, &c., an interest, it would seem that an agreement for the sale of land does not necessarily require to be registered in order to be admissible in evidence in a suit for specific performance of such agreement by the means of a decree ordering that the person bound by such agreement do execute a deed of instrument operating as an actual transfer of the property. If such an agreement be admissible in a suit for specific performance, I am unable to see on what principle a document containing covenants for title, though, no doubt, embodying "a transaction affecting immoveable property," should not be admissible in evidence in a suit for damages for breach of such covenants, provided always that the document containing such covenants is conformable to the requirements of the exceptive clause (*h*) of section 17 of the Act. If, for instance, the document tendered as evidence of the covenant for title in a suit for damages for breach of such covenant be so

framed as to embody such covenant, only, with, of course, a consideration in cases where necessary, and so as to conform to the requirements of clause (*h*) of section 17, I am of opinion that, to be admissible in evidence, registration would not be necessary; but where, as in the present case, the evidence of the covenant is contained in a document *itself* purporting to assign an interest in immoveable property, and when the effect of the covenant itself cannot be got at without looking at the portion of the document which contains the assignment, I think the document is not excepted by clause (*h*) of section 17 from the necessity of registration, and ought not to have been received in evidence, even for the purpose solely of proving the covenant for title. I have, it will be observed, been assuming—of which there was no evidence, though it was suggested—that the document was really executed for valuable consideration. If it was a deed of gift simply, and within clause (*a*) of section 17, there can be no doubt that it must be excluded for all purposes, as the exceptive clauses (*e*) to (*l*) are exceptions from the operation of clauses (*b*) and (*c*) only, and not from clause (*a*).

It was contended by defendants' counsel that, admitting the covenant as alleged to have been proved, no breach of it was shown, inasmuch as the plaintiff had not proved the act of Sakhárám Lakshmanji, namely, the execution of the alleged deed of gift of 16th February 1847, which constituted, or was the foundation for, the alleged breach of the covenant. The plaintiff certainly gave no evidence that such a document was ever executed. The only evidence of the alleged breach of covenant was the decrees in suit No. 157 of 1872, at the original hearing of 2nd August 1873 and on appeal of 1st April 1875, rejecting the plaintiff's claim to have possession of the premises purported to be conveyed to him by the indenture of 24th March 1871. But in a suit for an alleged breach of a covenant for title it is not enough to prove unsuccessful proceedings to recover possession from third parties, or even an eviction by third parties, in order to prove a breach of such covenant. As against the covenantor and his representatives, such proceedings are not necessarily, though they may happen to be, binding, and the plaintiff has in general to prove, as against the covenantor and his representatives, not only that the plaintiff's

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proceedings to recover possession had been unsuccessful, or that an eviction of the plaintiff had taken place, but that such proceedings were rightfully unsuccessful, or that such eviction was rightful. In other words, he has to prove, as against the covenantor or his representatives, that the title was bad by reason of some act or fact covenanted against. Otherwise it would be very easy for any purchaser, who had repented of his bargain, to get up collusive proceedings, either as plaintiff or defendant, and then sue the covenantor to recover purchase money and interest. In the present case, however, this point, which of itself would have been fatal in the plaintiff's case, does not arise. From the notes of the hearing before Mr. Justice Bayley, in 1873, of suit No. 157 of 1872, put in evidence on the part of the defendants, we find what were the issues in that case, and that the deed of gift of 16th February 1847 was relied upon by the defendants in that suit, and that it was, in fact, the ground on which the learned Judge proceeded in refusing relief to the plaintiff there. Then, we have the allegations, in para. 7 of the written statement of the defendants in the present suit, that Sakhárám Lakshmanji had, previously to the alleged indenture of 15th July 1865, made a valid and effectual gift of the said property to his daughter Shámábái and her heirs, and that, *therefore*, the said Sakhárám Lakshmanji had not, at the date of the said indenture, any right to make a gift of the same to the said Bhagvantráv Rámchandra. So that we have incidentally supplied on the defendant's part—by the notes of the hearing of suit No. 157 of 1872, and by the allegation in para. 7 of the written statement—proof of matters which it lay on the plaintiff to prove but which were not proved on his part, viz., that the Court had decided suit No. 157 of 1872 on the ground of an infirmity of title in the plaintiff in that suit, arising from an act of the covenantor Sakhárám Lakshmanji, and so within the operation of his covenant, and that such decision was a right one.

Another point raised by the defendants was as to the plaintiff's right to sue. He sues as assignee of an assignee of Bhagvantráv Rámchandra; but how can he be an assignee of Bhagvantráv Rámchandra, inasmuch as Bhagvantráv Rámchandra himself, by reason that the Registration Act excludes all operation on the

land of the conveyance to him by the document of 15th July 1865, cannot be held by the Court to have taken anything by that document? To this it was argued, in answer, that this is always so where, by a previous assurance or other act of the covenantor for title, he has already parted with his interest to another, and so conveys nothing under the subsequent conveyance to the person to whom he gives covenants for title, and yet in such case the covenantor or his representatives would not be heard to say that the plaintiff in an action on the covenant for title under such subsequent conveyance was not an assign by reason that nothing passed by the instrument so subsequently executed by the covenantor and purporting to be a conveyance to such plaintiff or to the predecessor in estate of such plaintiff. I am of opinion, however, that this answer has been successfully met by a reference to the principle of estoppel. Where a man by one instrument effectually conveys away his interest in land, and then by a subsequent instrument purports to convey it over again, accompanying his conveyance by vendor's covenants for title, and a subsequent assignee of the land is rightfully evicted by one claiming under the prior conveyance, there, though he who is claiming as assignee under the subsequent conveyance, and who brings a suit for breach of the covenant for title, is not *really* an assignee, for the reason that by the conveyance to his predecessor nothing, in fact, passed, yet the covenantor and his representatives by reason of the execution of the subsequent conveyance are estopped, in an action for breach of the covenant for title in such last-mentioned conveyance, from saying that nothing passed under that conveyance, or that, supposing derivative title from the covenantor proved, the plaintiff is not assignee of what the defendant is estopped from denying passed to such covenantee under such conveyance. But in that case the subsequent conveyance accompanied by the covenants for title are in evidence; here we cannot look at the deed of 15th July 1865, at any rate so far at it is a conveyance. The Legislature has enacted that, so far as this Court is concerned, there is no such conveyance, and there is nothing in evidence here which estops the defendants from showing, in accordance with the truth, that inasmuch as Bhagvantráv Rámchandra took nothing, so the plaintiff claiming under him has taken nothing, and is not, therefore,

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Bhagvantráv Rámchandra's assign of anything, and is not, therefore, in the alleged character of such assign, entitled to maintain this suit.

It was further contended that no damages could be awarded to the plaintiff, by reason that there was no valuable consideration for the indenture of 15th July 1865, and so not for the covenants therein contained, and this on the general principle that a Court exercising equitable jurisdiction will not assist one claiming under a voluntary settlement, unless, by the settlement itself or other acts, the relation of trustee and *cestui que trust* has been actually constituted according to the particular nature of the property. *Jefferys* v. *Jefferys*(1) was cited as a notable instance of the distinction observed. In that case a voluntary settlement, dated in September 1834, for the ultimate benefit of the settlor's three daughters, comprised a conveyance of freehold to certain trustees, and a covenant to surrender to the same persons certain copyholds. The settlor died without having surrendered the copyholds, and having by a will of August 1836 given part of the same freehold and copyhold estates to his wife Isabella, who after his death was admitted tenant to part of the copyholds. The voluntary settlement was carried into execution against the widow and devisee so far as concerned the freeholds; but so far as concerned the copyholds to which the widow had been admitted tenant, the plaintiffs being volunteers, and having a right lying in voluntary covenant only, their bill was dismissed. The Lord Chancellor states: "My impression is, that the principle of the Court to withhold its assistance from a volunteer, applies equally whether he seeks to have the benefit of a contract, a covenant, or a settlement." But, though this may be so, a Court of equity does not in England interfere with the right of a volunteer to maintain an action at law for damages for breach of a covenant, and of this we have two instances very apposite to the present case in *Hervey* v. *Audland*(2) and *Cox* v. *Barnard*.(3) In the first-named case a bill to have a voluntary settlement established, and the trusts of it performed, and the property delivered by the executor of the settlor to the trustee of the settlement, had been dismissed, on

(1) Cr. & Ph. 138.

(2) 14 Sim. 531. (3) 8 Hare 310.

the ground that the settlement was voluntary, and that a Court of equity would not assist a volunteer in the way asked. But the Court gave the plaintiff leave to bring an action at law for damages on a covenant for further assurance contained in the very same settlement, the trusts of which it had refused to decree the execution of. This action, we find, was, in fact, brought, and damages recovered: see *Ward* v. *Audland*.[1] So in *Cox* v. *Barnard*[2] the Court of equity in administering the estate of a deceased settlor, enforced, as against the estate, without recourse to an action at law, a covenant for further assurance contained in a voluntary settlement executed by the deceased, though it was doubtful, and at any rate the Court was unwilling to decide that the assignment of property comprised in the voluntary settlement would have been complete and effectual had it been attempted to enforce the trusts of it directly. There can, I think, be no doubt that, according to English law, damages may be recovered for breach of covenants for title contained in a voluntary settlement, even though the settlement may not be of such a character as to be effectual without the assistance of a Court of equity, and which assistance the Court of equity will refuse to a volunteer. This, however, depends on the principle of English law, that the fact of the solemnity of sealing and delivering a document is regarded at law as importing consideration. The question then arises, does the principle last referred to, hold as between Hindus? In the face of the decision of the Privy Council in *Rájá Sáhib Prahlad Sen* v. *Baboo Budhu Sing*[3] it is impossible to hold that it does. The Court there states it to be an indisputable proposition "that it has never been held by the Courts in India that a contract made under seal, of itself, imported that there was a sufficient consideration for the agreement." This being so, the fact that the indenture of 15th July 1865 was sealed and delivered by Sakhárám Lakshmanji is immaterial to the question, and we have the ordinary case of a plaintiff suing on a contract for which there was no consideration other than natural love and affection, which, of course, cannot be made the ground of a suit for damages.

The fifth issue, viz., whether the plaintiff is a purchaser, for valuable consideration without notice, of the property comprised

[1] 16 M. & W. 862. [2] 8 Hare 310. [3] 2 Beng. L. R. 111 P. C.

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in the indenture of 15th July 1865, does not, in my opinion, need much discussion, as it is not decisive of the case, whichever way that issue may be found. On the one hand, it is clear enough that the present plaintiff, before he completed his purchase by the execution of the conveyance of 14th March 1871, and before he paid the sum of Rs. 18,750, the balance of the purchase money, had notice by the hand-bill (exhibit A) and otherwise, that the property sold was the subject of a then pending suit in this Court, and that it was alleged that, by a deed of gift of 16th February 1847, the said property had been given over to Shámábái for life, with remainder to her sons "till (*sic*) their lives." Then by the conditions of sale the plaintiff must, or at least might, have known that he was purchasing a shaky title, as they provide, *inter alia*, that the purchaser shall not raise any objection of the vendor's title, or make any requisitions thereon, but shall accept such title as the vendor can give, and the vendor shall not be required by the purchaser to clear any claim that may be made to the premises by any person. On the other hand, if this had been a case depending on the question of purchase for value without notice, the plaintiff, though *he* had notice when he completed his purchase, yet might have protected himself by the fact that his vendor, Shrikrishná Náráyen, was a purchaser for value without notice, and there is no evidence whatever to show that Shrikrishná, at the time of the mortgages of 6th April 1867 and 1st September 1868, had any notice of the deed of gift of 16th February 1847, or that Bhagvantráv Rámchandra was otherwise than absolutely entitled to the mortgaged premises.

Then a few observations as to the issue upon the Limitation Act. The covenant sued on, consists of three branches: 1st, that Sakhárám Lakshmanji now—*i.e.*, on 15th July 1865—hath power to grant and convey; 2nd, that the premises conveyed shall at all times thereafter—*i.e.*, from the same date—remain and be to the use of the grantee, and be enjoyed without interruption by Sakhárám Lakshmanji or any one claiming through him, and free and discharged from all estates, incumbrances, &c., created by Sakhárám Lakshmanji or any one claiming through, or in trust, &c., for him; and, 3rd, for further assurance.

As to the first branch of the covenant, the breach took place on the day the indenture was executed, viz., 15th July 1865 (see Dart's Vendors and Purchasers, 4th ed., 715), and the suit is barred.

As to the second branch of the covenant, it would seem to be one of those covenants admitting of a continuing breach, so that under section 23 of the Limitation Act a suit would not be barred so long as the breach continues, and that, therefore, the suit, if otherwise maintainable, would not be barred by reason of the Limitation Act.

As to the third branch of the covenant, it does not appear ever to have been broken at all. Such a covenant is broken by a refusal of the persons bound by it to execute, or procure to be executed, a proper further assurance when tendered to them on the part of the persons requiring performance of the covenant, and there is no evidence in the present case of any such refusal by the defendants, or that they have ever been required to execute, or procure to be executed, a further assurance, though we may fairly assume that they would have refused had they been asked.

The findings on the issues will be as follows:—on the first in the negative, for the reason that the plaint and written statement in this suit agree in alleging in effect that, before the deed of the 15th July 1865 was executed, Sakhárám Lakshmanji, the person who by such last-mentioned deed purports to convey the premises therein mentioned to the said Bhagvantráv Rámchandra, had by an earlier deed of gift, which, however, has not been put in evidence in this suit effectually granted and conveyed the said premises to persons other than the said Bhagvantráv Rámchandra, and from whom there is no evidence that the said Bhagvantráv Rámchandra ever acquired the same.

On the second issue the finding is in the negative, and for the defendants, on the ground that the document containing such alleged covenant is not registered, and is, therefore, inadmissible in evidence.

On the third issue the finding is, that there was no consideration for the deed and covenant therein mentioned other than natural love and affection.

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The fourth, fifth, sixth, and seventh issues are found in the negative, and for the defendants.

On the 8th issue it is not necessary to record any finding.

The decree is, that the suit be dismissed, and with costs.

[APPELLATE CIVIL.]

Before Sir M. R. Westropp, Kt., Chief Justice, and Mr. Justice Melvill.

JAMNADAS AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS *v.* LALITARAM AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

August 7.

Execution of decree—Limitation Act IX of 1871, *Schedule II, Article* 167 *Clause* 4*—Application to "keep in force" decrees or orders.*

The Pensions Act (XXIII of 1871) is not retrospective.

The "application" spoken of in article 167, clause 4, of schedule II, to Act IX of 1871 is not merely such an application as is contemplated by section 212 of Act VIII of 1859, but includes an application to keep in force a decree or order.

The language of article 167, clause 4 of schedule II to Act IX of 1871 is wide enough to include any application to enforce or keep in force decrees or orders, and, consequently, an application to enforce or keep in force a decree by the attachment of a portion of the property of the defendant, will keep the decree alive against the residue of his property or his person.

Jibhái Máhipáti v. *Párbhu Bápu* (I. L. R. 1 Bom. 59) distinguished. *Gouree Sunkur* v. *Arman Ali* (21 Calc. W. R. 309 Civ. Rul. mentioned.

An order for attachment of a pension in satisfaction of a decree obtained on the 10th December 1863, was made on 16th April 1869. After the passing of the Pensions Act (XXIII of 1871), the Deputy Collector refused to continue paying the pension to the decree-holder, and return to the Court the warrant of execution issued under the order of 16th April 1869, and an order finally disposing of the application for attachment was made on 14th June 1872. On 19th June 1872 the decree-holder presented a fresh application, praying that the attachment of the pension might be continued, and a letter be written to the Collector, directing him to continue to pay the pension to the decree-holder, as directed by the order of 16th April 1869.

Held that such last-mentioned application came within clause 4 of article 167 of schedule II to Act IX of 1871, and that, consequently, an application on 24th July 1874, for execution of the decree of 10th December 1863, was not barred.

Held, also, that the decree might properly be enforced against property of the defendant, mentioned in the application of 1874, other than the property mentioned in the applications of 1869 and 1872.

* Miscellaneous Appeal No. 9 of 1875.

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THIS was a miscellaneous appeal from an order made by Cursetji Rostomji, First Class Subordinate Judge at Surat, in an execution matter. He held that the decree, of which execution was sought in this case, was barred.

On the 10th December 1863, the plaintiffs obtained a decree, directing defendant to pay to plaintiffs a certain sum of money, and declaring plaintiffs entitled to a mortgage (dated the 25th January 1856) upon a monthly permanent pension of Rs. 300, payable quarterly to defendant. On the 16th April 1869, the plaintiffs by a *darkhast* (application) prayed attachment of the pension, and the attachment was granted by the Court. Subsequently, the Pensions Act XXIII of 1871 having being passed in the interval, the Deputy Collector, on the 13th May 1872, informed the Court by a letter that, in consequence of that Act, he declined to continue to the plaintiffs the payment of the pension which up to that date had, pursuant to the order of the 16th April 1869, been paid to the plaintiffs, and he returned to the Court the warrant of execution which had been issued under the order of the 16th April 1869. On the 14th June 1872, the Court finally disposed of the *darkhast* of the 16th January 1869. On the 19th June 1872, the plaintiffs presented another *darkhast*, and, referring to the act of the Collector, alleged that the Pensions Act did not affect the plaintiffs' rights, and prayed that the attachment of the pension should be continued. The Court rejected that application. On appeal, the High Court, on the 12th August 1874, reversed the order of the lower Court, and declared that Act XXIII of 1871 was not retrospective, and did not affect either plaintiffs' rights under the mortgage of the 25th January 1856, the decree thereon of 1863, or the order for attachment of the 16th April 1869.[1] On the 24th July 1874, the plaintiffs applied for execution of the decree

[1] The following is the judgment of the Appellate Court on the point:—"The Court reverses the order of the Subordinate Judge, and declares that the plaintiffs' mortgage of the 25th January 1856, and the decree thereon of the 10th December 1863, and the order of the 16th April 1869, are, respectively, unaffected by Act XXIII of 1871, and that the pension, in the petition mentioned, must be paid to the plaintiffs until the moneys due for principal, interest, and costs under the said mortgage and decree are fully paid and satisfied: and let the respondents pay to the plaintiffs the costs of this application both in the Court below and in this Court, and, in default of such payment, let the plaintiffs be entitled to recover the same from the said pension. The Court is of opinion that, even independently of the express saving contained in the first section of Act XXIII of 1871, there is not any ground whatever for regarding that Act as retrospective in its operation."

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of the 10th December 1863 against certain moveable property of the defendant; but the lower Court held the decree barred, for the reasons appearing in the following extract from its judgment:—"The question is, whether the present application (24th July 1874) for execution is barred under article 167, schedule II, Act IX of 1871. I think it is so barred. The portion of the article which is applicable to this case, says that the time for an application for execution begins to run 'from the date of applying to the Court to enforce or *keep in force the decree*.' It is contended for the plaintiff that his petition of the 19th June 1872 should be treated as an application to keep the decree alive. In my opinion, what is intended by the said article, is not such a petition as the one made to the Court, *casually* requesting it to order the revenue officer to pay the allowance to the plaintiff as directed before. Under the old law (section 20, Act XIV of 1859) some *proceeding* to enforce or to keep in force the decree was sufficient; but the present law requires that there should be an application especially to enforce or keep in force the decree. The said petition is neither for enforcing nor for keeping in force the decree, but is for a different purpose. I have my own doubts on the point, and I am of opinion that the petition in question could not be treated as an application falling under the said article 167, schedule II of the Limitation Act. I, therefore, reject this application for execution, holding it to be time-barred." From this decision the plaintiffs appealed.

Shántárám Náráyán appeared for the appellants.

Nagindás Tulsidás appeared for the respondents.

The argument and the authorities cited, appear from the following judgment delivered by

WESTROPP, C.J.:—The *darkhast* of the 24th July 1874 prays execution of the decree of the 10th December 1863 against certain specified moveable property of the defendants, on which decree the plaintiffs alleged that Rs. 21,346-5-5 are still due. It had directed the defendants to pay to the plaintiffs the sum of Rs. 43,667-9-10, and also declared the plaintiffs entitled to a mortgage (dated 25th January 1856) upon a monthly permanent

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pension of Rs. 300 payable quarterly to the defendants. On the 16th April 1869, the plaintiffs, by a *darkhast* alleging that Rs. 30,789-3-5 were then due on the decree of 1863, prayed attachment of the pension; and the Court of the Subordinate Judge ordered the same accordingly. Subsequently the Pensions Act XXIII of 1871 was passed, and the Deputy Collector of the Zillah of Surat, by letter of 13th May 1872 to the Court, in consequence of the passing of that Act, declined to continue to the plaintiffs the payment of the pension, which, up to that date, had, pursuant to the order of the 16th April 1869, been paid to the plaintiffs, and the warrant of execution, which had been issued under that order of the 16th April 1869, was returned to the Court; and the Court on the 14th June 1872 made an order finally disposing of the *darkhast* of April 16th, 1869. On the 19th June 1872 the plaintiffs presented a fresh *darkhast* against the defendants, mentioning the act of the Deputy Collector, alleging that Act XXIII of 1871 did not affect the rights of the plaintiffs, and praying that the attachment of the pension should be continued, and that a letter should be written to the Collector, directing that the payment of the pension to the plaintiffs, as ordered on the 16th April 1869, should be continued. The Subordinate Judge refused that application. The plaintiffs appealed to this Court, which, on the 12th August 1874, reversed the order of the Subordinate Judge, and declared that the Pensions Act XXIII of 1871 was not retrospective, and did not affect the rights of the plaintiffs under their mortgage of the 25th January 1856, the decree thereon of 1863, or the order for attachment of the 16th April 1869.[1] The Subordinate Judge has held that the application of the 19th June 1872 is not such an application as falls within the 4th clause of article 167 of schedule II to Act IX of 1871. In support of that view the learned pleader for the defendants has cited *Gouree Sunkur Tribedee* v. *Arman Ali Chowdhry*[2] (the report of which is too meagre to be of any value) for the proposition, that the application spoken of in article 167, clause 4, must, at least, be such an application as is contemplated by section 212 of the Civil Procedure Code (Act VIII of 1859).

(1) *Supra*, note to page 295. (2) 21 Calc., W. R. 309 Civ. Rul.

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But section 212 applies merely to the enforcement of decrees, whereas article 167, clause 4, speaks not only of applications to the Court to 'enforce,' but also of applications to the Court to "*keep in force*" decrees or orders. The enforcement of the decree in the present case was for a time interrupted by the act of the Collector in stopping the payment of the pension to the plaintiffs. The *darkhast* of the plaintiffs of the 19th June 1872, presented five days after the occurrence of the interruption, seems to us most clearly to be, at least, an application to keep the decree in force, pursuant to the order of attachment of the 16th April 1869. For the defendants it has been argued that the applications of 1869 and 1872, having been directed against the pension only, could not serve to keep alive the decree, so that it might properly be enforced against other property of the defendants. But we find no such limitation in article 167, clause 4. The language of that enactment is wide enough to include any application to enforce or keep in force decrees or orders. It cannot be successfully maintained that an application, within three years, for the arrest of the defendants under the decree, would not keep the decree alive against their property; still less can it be maintained that an application to enforce or keep in force the decree by attachment of a portion of their property would not keep the decree alive against the residue of their property or against their persons. It is no part of the duty of the Civil Courts to make Limitation Acts more stringent than the Legislature has made them; and, were we to yield to the argument on behalf of the defendants, we should do so.

Jibhái Máhipáti v. *Párbhu Bápu*[1] has been cited; but the *darkhast*, relied on there to take the case out of the Limitation Act, seems to have been of a different character from that which we have here, which latter is, if it be anything, an application to keep the decree in force. Moreover, the head-note of the case cited appears to go further than the judgment of the Court in stating that *Gouree Sunkur Tribedee* v. *Arman Ali Chowdhry*[2] was followed. That case certainly was referred to by West, J., in his judgment; but he went on to say that the application, even if

(1) I. L. R. 1 Bom. 59. (2) 21 Calc., W. R. 309 Civ. Rul.

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it had been of a sufficient character to prevent the bar of limitation, had not been presented in sufficient time for that purpose.

It is as well to refer to our Circular Order at page 72 of the Circular Order Book, which provides that "when an estate yielding a periodical payment is attached, it is not necessary to file a fresh *darkhast* for each payment." This regards the execution of the decree as continuable under the original attachment, if the estate attached be one yielding a periodical payment.

For these reasons we reverse the order of the Subordinate Judge of the 27th February 1875, as we are of opinion that the decree is nor barred by the law of limitation, inasmuch as the application of the 19th June 1872 gave to the plaintiffs a fresh terminus whence time began to run, and the period of three years from that terminus had not expired when the present application of the 24th July 1874 was presented. The prayer of the *darkhast* of that date should, therefore, be complied with, and execution accordingly must issue against the property named therein. The defendants must pay to the plaintiffs the costs of that application in the Court below, and of the appeal therein to this Court.

Order reversed.

[APPELLATE CIVIL.]

Before Mr. Justice West and Mr. Justice Pinhey.

August 17.

LALUBHAI SURCHAND (ORIGINAL PLAINTIFF), APPELLANT *v.* BAI AMRIT AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Hindu law—Sale—Possession—Notice—Registration.

Delivery of possession of the property sold is, under the Hindu law essential to complete the title of the vendee against a third party purchasing with possession from the same vendor without notice of the prior transaction.

The rule prevails as between competing conveyances, both of which have been registered.

Authorities and Hindu law texts on the subject reviewed.

THIS was a special appeal from the decision of Satyendranath Tagore, Judge of the district of Ahmedabad, confirming the decree of the Subordinate Judge of Ahmedabad.

* Special Appeal No. 107 of 1877.

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The material facts of the case are as follows :—

The first two defendants, Bái Amrit and her husband, sold a house belonging to them to the plaintiff, Lalubhái, for Rs. 191 on the 2nd of July 1868, and, having received Rs. 41 out of this sum as part payment, executed to him a deed of sale. Later, in the same day, they received a better offer for their house from the third defendant, Táráchand, which they accepted, and, having received from him the full amount of the purchase-money, executed to him also a deed of sale, and put him into possession.

Subsequently the plaintiff tendered to Amrit and her husband the balance of his purchase-money, but they refused to receive it.

Both Lalubhái and Táráchand duly registered their deeds; but the former not until 26th July 1872, while the latter registered his five days after its execution, on 7th July 1868.

The plaintiff, Lalubhái, in 1873 brought this suit, relying on the prior sale to himself, against Amrit and her husband, and the subsequent purchaser Táráchand, and prayed to be put into possession of the house.

The defendants, Amrit and her husband, denied the execution of the plaintiff's deed, and asserted that the house, which really belonged to Amrit alone, had been sold *bonâ fide* by her to the third defendant, Táráchand. Táráchand answered that the plaintiff's deed was a fabrication, and that, even if it were genuine, he being in possession, it was inoperative as against him.

The Subordinate Judge of Ahmedabad found the plaintiff's deed not proved, and rejected his claim.

The Judge, Mr. Tagore, in appeal found both the deeds proved; but confirmed the decree of the Subordinate Judge, on the ground that Táráchand had no notice of the prior sale, and being in possession, could not be ousted by the plaintiff, who was only entitled to a refund of the portion of the purchase money paid by him.

Shántárám Nárávan for the special appellant, the plaintiff :—

The District Judge, in arriving at his decision as to the *bonâ fides* of Táráchand's deed, laid this burden of proof on the wrong

party. Táráchand pleads a purchase for valuable consideration without notice of the plaintiff's earlier deed; the burden of proving want of information and good faith on his own part in making his subsequent purchase, should, therefore, have been thrown upon him.

The fact of Táráchand's deed being executed on the same day as that of the plaintiff, gives rise to a presumption that Táráchand and Amrit colluded to defraud the plaintiff.

The registration of the plaintiff's deed cured any defect which may have existed in the plaintiff's title from his not being put in possession. By section 47 of Act XX of 1866 the deed, after it was registered, operated to exclude Táráchand from the moment of its execution. Táráchand, therefore, took nothing by his subsequent purchase.

The circumstance of Táráchand being in possession makes no difference, as delivery of possession is not, according to Hindu law, essential to the validity of a sale of immoveable property.

Pándurang Balibhadra, for Amrit, denied the execution of the plaintiff's deed.

Bahiravnáth Mangesh for Táráchand:—The District Judge was right in requiring the plaintiff to prove that Táráchand had notice.

As to the presumption of fraud, none such arises, and the Judge has found, as a fact, that Táráchand had no notice.

Both deeds being registered, the question must be decided irrespective of registration.

Possession is necessary to the validity of a sale. The defendant Táráchand's deed being accompanied by possession must prevail: *Hormusjee Mánekjee* v. *Pándoorung Tookdeo*,(1) *Rutunbhartee* v. *Kisunbhartee*,(2) *Durgá* v. *Hurtá*,(3) *Bálárám Nemchand* v. *Appá Dulu*,(4) *Selam Sheikh* v. *Baidonáth Ghatak*,(5) *Káchu* v. *Káchoba*.(6)

(1) 3 Morr. S. D. A. Rep. 27.
(2) 4 Morr. S. D. A. Rep. 44.
(3) 7 Harr. S. D. A. Rep. 342.
(4) 9 Bom. H. C. Rep. 121.
(5) 3 Beng. L. R. 312 A. C. J.
(6) 10 Bom. H. C. Rep. 491.

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Shántárám in reply, in support of his contention that possession was not necessary, cited the following cases:—*Rágho Bugdájee* v. *Vittoo Máhádjee*,(1) over-ruling *Hormusjee* v. *Pándoorung*,(2) *Nároo Huree* v. *Konheir Munoher*,(3) *Nágubái* v. *Motigir*,(4) *Bhukan* v. *Bháiji*,(5) *Girdhar Parjárám* v. *Dáji Dulabhrám*,(6) *Prán-krishna Dey* v. *Biswambhar Sen*,(7) *Gungáhurry* v. *Rágubram*,(8) *Lokenáth Ghose* v. *Jugobundhoo Roy*.(9) He also cited the following texts:—

Mit., Ch. III, S. 3, pl. 5, Mac. H. L. 203.
Ibid. S. 5, pl. 4, do. 213.
Ibid. S. 6, pl. 4, do. 218.
Institutes of Narada, ch. IV, Jolly's Trans., pages 24 and 25.
Mayukha, ch. IX. pl. 6.
Virmitrodaya, 1 Cal. ed. 1875, 207, line 10.
Ibid. do. 208, line 6.

The judgment of the Court was delivered by

WEST, J.:—The facts found in this case are that Lalubhái Surchand agreed with Bái Amrit for the purchase from her of a house. He paid a portion of the purchase-money, rather less than one-fourth, and a sale-deed in his favour was executed by Amrit and her husband Ranchod Manor. This was dated 2nd July 1868; but, pending payment in full, possession was not delivered to Lalubhái, and on the same date a second conveyance for valuable consideration was made by Amrit and Ranchod to Tárá-chand, who received immediate possession. Amrit could then no longer give effect to her contract with Lalubhái, and she declined to receive the remainder of his purchase-money when he tendered it. Both deeds have been registered, and Lalubhái, charging Bái Amrit and Táráchand with fraud, seeks now to enforce the completion of the transaction with him by a delivery into his possession of the house that he purchased. The accusation of fraud is retorted by the defendants; but, on the facts found by the lower Court, we must hold that the only knavery

(1) 8 Harr. S. D. A. Rep. 229.
(2) 3 Morr. S. D. A. Rep. 27.
(3) 8 Harr. S. D. A. Rep. 289.
(4) 1 Bom. H. C. Rep. 5.
(5) 1 Bom. H. C. Rep. 19.
(6) 7 Bom. H. C. Rep. 4 A. C. J.
(7) 2 Beng. L. R. 207 A. C. J.
(8) 14 Beng. L. R. 307.
(9) I. L. R. 1 Calc. 297.

in the case was that practised by Bái Amrit in selling the same property twice over. The District Judge, as to Lalubhái's deed, sees "no reasons to think that the document was a forged one," and, on the other hand, "there is no evidence that defendant Táráchand purchased with notice of the previous sale to plaintiff."

With reference to this last statement of the District Judge, it has been urged by Mr. Shántárám, for the appellant Lalubhái, that the defendant Táráchand, pleading a purchase for valuable consideration without notice of the contract with the plaintiff, or what in substance amounted to and has been treated as such a plea, was bound to prove want of information and good faith on his own part in making the purchase. In Gresley's Law of Evidence, p. 388, however, we find the principle "*ei incumbit probatio qui dicit, non ei qui negat*"(1) laid down as determining the burden of proof equally in equity proceedings as in trials at Common Law, and as an illustration it is said: "If, for instance, an answer states a purchase for a valuable consideration without notice, and they go into evidence, the plaintiff will have to prove the notice." (*Eyre* v. *Dolphin* (2).) In the note to *Jones* v. *Thomas*(3) it is said: "In all cases of a plea of purchase .... notice must be denied though not charged by the bill..... since all the defendant has to do is to prove his plea, for the defendant is not to prove a negative, viz., that he had no notice." And the reason for this is given in Fisher on Mortgage, section 1177, p. 637, 2nd ed.:—"Notice must be denied, though it be not charged by the bill, for the denial ought to appear on the pleadings that there may be an opportunity of proving it." In section 1104, p. 598, the general rule is stated that "the *onus* lies on a person who claims priority over another, on the ground that he took with notice of an earlier security, to prove that he had such notice;" and in section 1179, p. 639, it is said that "the evidence of a single witness will not suffice to establish notice, either actual or constructive, against a positive, plain, and precise denial by the answer, where the credit is equal." The purchaser pleading absence of notice is "held strictly to proof

(1) The *onus* of proof lies on him who asserts, and not on him who denies.

(2) 2 B. & B. 290, 303. (3) 3 P. Wms. 243.

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of the payment" (*Ibid.* s. 1180) that being an affirmative matter; but when he has thus far established his good faith, it devolves on the opposite party to prove notice or the circumstances from which the Court may infer a knowledge or means of knowledge of the previous transaction.

It has been urged that in the present case the mere circumstance of Táráchand's having bought immediately after Lalubhái is in itself so calculated to arouse suspicion that, in the absence of positive proof of want of notice on his part, a presumption arises and must prevail that he acted in collusion with Bái Amrit in order to defraud Lalubhái. The law, however, does not so readily raise a presumption of fraud. The District Judge, indeed, has found that "the transaction on which the plaintiff (Lalubhái) relies, is not wholly free from suspicion; it is also unfortunately true that much of the evidence adduced by him is manifestly false and unreliable," so that if mere suspicion is to weigh against the transaction of Bái Amrit with the one or the other of her vendees, Lalubhái could not gain by this addition to accepted legal principles. The circumstances, so far as he believed them proved by the evidence, attending each transaction were for the District Judge to weigh, and weighing them he has arrived at the conclusion that Táráchand purchased without "notice of the previous sale" to Lalubhái.

But Lalubhái's purchase was, at least, "previous" to that of Táráchand,—previous so far as the execution of the sale-deed went, and on this it has been contended that, as after the transaction with Lalubhái nothing was left to Bái Amrit which she could dispose of, so Táráchand took nothing by his conveyance. The delivery of possession to him makes it is urged, no difference when once the fact has been arrived at, of an earlier sale to Lalubhái. In the first part of the Mitakshara Vyavahara Kanda translated by Sir W. Macnaghten,[1] it is said[2] "a person is entitled to mortgage, give or sell his own property, but he has no proprietary right over things already mortgaged, given or sold."

(1) Mac. H. L. p. 203.

(2) स्वयमेव ह्याधेयन्देयं विक्रेयंच भवति, न चा हितस्य दत्तस्य विक्रीतस्य वा स्वत्वमस्ति. (*Ibid.* f. 12, p. 1, 1, 9.)

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At page 213 it is said[1] "a title is weightier evidence than possession, provided that possession is unconfirmed by hereditary succession;" and again at page 218[2] "a title, therefore, without corporeal acceptance ..... is weaker than a title accompanied by it. ..... But such is the case only when of these two the priority is undistinguishable; but when it is ascertained which is first in point of date and which posterior, then the simple prior title affords the stronger evidence." These are the strongest passages that have been cited to us, and they certainly afford a powerful *primâ facie* support to Lalubhái's contention. As to the last of them, however, Vijnyaneshwara proposes an alternative construction of the Smritis in this sense:—(1) A title by itself is better than short possession by itself. (2) Possession with three descents cast prevails over a mere documentary title. (3) A title with a possession for less than the period of prescription though but a slight possession prevails over a title unaccompanied by possession. The decision on the third of the cases here put, is supported by a reference to Narada, and, if it correctly represents the Hindu law, it supports the judgment of the District Court in favour of the defendant Táráchand. He has a title and possession under it, while Lalubhái has not, and has never had possession under his title.

As to this, however, it is argued that Táráchand has not any real title at all. Bái Amrit's rights had already vested in Lalubhái when she affected to convey the house to his rival. The effect of admitting this view, supposing the rule (3) applies to the present case at all, would be to deprive it of its operation in the only cases in which it could be of use. As between two titles *per se* the better is the earlier according to the often-quoted

(1) पूर्वेषां पित्रादीनां त्रयाणां क्रमः, पूर्वक्रमः तेनागतयोर्यो भोगस्तस्मादिना आगमोऽभ्यधिकः. (*Ibid.* f.14, p. 1, l. 11.)

(2) फलोपभोगलक्षण कायिक स्वीकार विकल आगमो दुर्बलो भवति तत्सहितादागमाभावात्, एतच्च द्वयोः पूर्वापर कालापरिज्ञाने. पूर्वापरकालज्ञानेतु विगुणोपि पूर्व कालागम एव बलीयानिति. (Mit. Vyav. f. 14, p. 2, l. 14.)

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maxim of Yajnavalkia[1]—"In the case of a pledge, a gift, or a sale, the prior contract has the greater force"—Yajna. II, 23 (Coleb. Dig., b. II, ch. II, sec I, t. 28); and thus when the comparative dates had been once ascertained, possession would for the earlier deed be a needless, for the later an ineffectual corroboration. The true sense of the rule is obviously this, that he who holds by what the Roman law called a *justus titulus* or *justa causa*, that is, a title *primâ facie* capable of constituting ownership, shall from his possession derive a confirmation of that title such as to give it effect for its proper purpose against any other title not accompanied by possession. So taking it, the passages cited from the same sage, Narada, at an earlier part of the Mitakshara[2] (Macn. H. L., page 212) unite with it to form a perfectly consistent theory. In Jolly's Translation, page 24, the passages are rendered :—"Where possession exists, but no title whatever exists, there a title but not possession alone can confer proprietary rights." See to the same effect Manu VIII, 200 : "A title having been substantiated, the possession becomes valid; it remains invalid without a proved title." That is, although "possession is more decisive than documentary and oral testimony" (Jolly's Narada, page 23, corrected), yet it must be supported by a title *primâ facie* effectual. The title, too, must have been acquired under circumstances indicative of good faith; a fraudulent purchase is regarded as a theft (Brihaspati in Coleb. Dig., b. II, ch. II, sec. II, t. 57; Manu VIII, 165), and fraud vitiates every transaction. Where one in possession stands on such possession alone, he is to be regarded as a thief[3] (*Ib.* p. 24), unless the possession has come to him through three descents, when, according to Narada (*Ib.* p. 25), an originally unlawful possession acquires legality, or, as Vijnyaneshwara prefers to put it, raises the presumption that a title exists, though it cannot be produced (Macn. H. L. 213).

(1) आधौ प्रतिग्रहे क्रीते पूर्वा तु बलवत्तरा. (*Ibid.* f. 11, p. 2, l. 7.)

(2) आगमेन विशुद्धेन भोगोयाति प्रमाणताम् अविशुद्धागमोभोगः प्रामाण्यं नैवगच्छतीति. (*Ibid.* f. 13, p. 2, l. 12.)

(3) भोगश्चेद्बलतोयस्तु कीर्तयेन्नागमंक्वचित् भोगच्छलापदेशेनविज्ञेय स तु तस्कर इति. (Mit. Vyav. f. 13, p. 2, l. 14.)

But though Vijnyaneshwara gives the construction of the Smritis on which we have been remarking as an admissible alternative, it is plain that he did not himself prefer it. For the purposes of his discussion he insists repeatedly on the superiority of an earlier title once proved over a later one, though corroborated by actual possession. The questions, then, arise, of what particular contests he has in view; how far the principles he advocated necessarily govern, or are meant to govern, such a case as the one now before us; and which of the different methods of interpretation is the more in harmony with the ancient writings accepted as authoritative, or has been by its general acceptance adopted into the customary law.

The discussion in the Mitakshara (Macn. H. L. 199, &c.) is by way of exegesis or commentary on the following two slokas of Yajnavalkya:—

"In all disputes, where property is concerned, the last act is of greater force except in cases of pledge, acceptance, and sale, when the first act is of greater force;"

and

"If one sees his land in the possession of another and say nothing, it is lost after twenty years; moveables after ten years,"[2] Yajn. II, 23, 24.

The first of these is plainly as to the preference to be given to legal acts in virtue of their relative priority. The second is as plainly a rule of prescription. As to the former, Vijnyaneshwara sets himself the question —"To which of the two acts will the greater weight attach, when each party adduces evidence undistinguishable in point of preference, the one asserting a prior and the other a posterior claim[3] (Macn. H. L. 199); and the instances he adduces are meant to show that a later transaction between the

(1) सर्वेष्वर्थविवादेषु बलवत्युत्तरा क्रिया। आधौ प्रतिग्रहे क्रीते पूर्वातु बलवत्तरा (*Ibid.* f. 11, p. 2, l. 2, 7.)

(2) पश्यतो ब्रुवतोहानि भूमेर्विंशति वार्षिकी। परेणभुज्यमानाया: धनस्य दशवार्षिकी. (*Ibid.* f. 11, p. 2, l, 11.)

(3) उभयच, प्रमाणसद्भावे प्रमाणगत बलाबलविवेके चा सति पूर्वापरयो: कार्ययोः कस्य बलीयस्त्वम्. (*Ibid.* f. 11, p. 2, l. 1.)

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same parties supported by similar evidence supersedes an earlier one, while exceptionally (as he calls it) the earlier of two contracts made with different parties in the case of a gift, sale, or pledge, prevails over the later. He has in view only contracts supported by evidence regarded as of equal weight. Of the "legal proofs described as writings, witnesses, and possession" (Yajn. II, 22, Narada on Evidence 2 Jolly, p. 23), Narada (*loc. cit.*) says that "the first is superior to the second, but possession is more decisive than the other two." Where, therefore, there is possession fortifying one of two titles, otherwise equal, save in point of date of origin, the "evidence" is no longer "undistinguishable in point of preference," and Vijnyaneshwara's remarks would not, but for what follows under the succeeding sloka, apply to such a case. In afterwards commenting, indeed, on the text of Yajn. (II, 60) "A mortgage with possession (or acceptance) is complete," Vijnyaneshwara, as referred to in 2 Borra. 151 and Bellasis 60, says of the two kinds of mortgages, *gopya* (=for deposit) and *bhogya* (=usufructuary), that "these are complete by possession and enjoyment and not merely by writing, (oral) evidence, or the intention of the parties.[1] [Priority of possession with (*i.e.*, accompanying) these is valid, without them it is invalid.]" These last words in the translation seem to be meant as the substance of a passage of Narada which with the continuation of the commentary on the Mitakshara is as follows:—

"As Narada says 'A pledge is said to be of two kinds, moveable and immoveable. Both are valid when there is actual enjoyment, not otherwise'"[2] (see Jolly's Translation, p. 31).

"The purport of this is 'In the matter of a pledge, gift, and purchase, the prior act prevails;' such is the declaration. [But] the first act resulting in possession is to be deemed the more effectual, the act not accompanied by acceptance though prior is

[1] आधेः स्वीकरणात्सिद्धिः ...। आधेर्गोप्यस्य भोग्यस्य च स्वीकरणादुपभोगादाधि ग्रहणसिद्धिः, नसाक्षिलिखनमात्रेण नाप्यदृश्यमात्रेण। (*Ibid.* f. 24, p. 2, l. 14.)

[2] आधिस्तु द्विविधः प्रोक्तो जंगमः स्थावरस्तथा, सिद्धिरस्योभयस्यापि भोगोयद्यस्ति नान्यथेति ॥. (Mit. Vyav. f. 24, p. 2, l. 15.)

not deemed effectual."[1] We know that in the case of mortgages, an apparent title acquired in good faith from an owner left in possession, and accompanied by a transfer of the possession, has always, in this part of India, prevailed over an earlier mortgage without possession, except where a local custom has modified the general law; and the three cases of mortgage, sale, and gift are placed by the Smriti on exactly the same footing. In the case of mortgages as of sales, some commentators besides Vijnyaneshwara (Mitak in Macn. H. L. 200, 203) have argued that the first mortgage deprives the second of validity, as a second is forbidden under a penalty to the mortgagor (Coleb. Dig., b. 1, ch. III, t. 129, Comm.); but this has not prevented the acceptance of the doctrine, that possession is essential to the mortgagee's real right in the property as distinguished from his contractual right with reference to it against the person of the mortgagor.

In commenting on the second of the texts which we have quoted, Vijnyaneshwara (Macn. H. L. 201 s. s.) proceeds boldly to set aside its obvious meaning. He says that the owner is by twenty years' adverse possession deprived only of the profits of the property. He says that mere possession is not amongst the eight recognized means of acquired property, and he cites Narada and Katyayana to show that mere possession without a title creates no property in the thing possessed. The former quotation (Jolly, p. 24) we have already discussed. It is so far from having the effect which Vijnyaneshwara seeks to draw from it, that Narada says distinctly (Jolly, p. 23): "If a man foolishly suffers his property to be enjoyed by strangers, it will become those strangers' own through the effect of possession, although the proprietor is known to be alive.

"Whatever property a proprietor sees with his own eyes being enjoyed by strangers, without for ten years asserting his rights, may not be recovered by him."

Katyayana again says that partition of property must be presumed after an actual separation of brethren for ten years, and

[1] अस्य च फलम्। आधौ प्रतिग्रहे क्रीते पूर्वात्तु बलवत्तरेति या स्वीकारान्ताक्रिया सा पूर्वा बलवती, स्वीकार रहिता तु पूर्वापि न बलवतीति। *Ibid.* f. 24, p. 2, l. 16.)

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this is referred by the Smriti Chandrika (Transl., p. 241) to the rules of prescription of Vajnavalkya himself. When, therefore, Katyayana says that "in the possession of cattle, male or female slaves, &c., there is no validity either for the unlawful taker or his son"[1] (Macn. H. L. 202), this cannot without a gross perversion be twisted into a denial of the general rule of prescription which it is plain Katyayana accepted. Vijnyaneshwara, indeed, himself quotes a passage of Katyayana which is identical in sense with the rule of Narada (Mitak. Macn. H. L. 213).

Manu is next cited, and his rule (Manu VIII, 147) being identical with Narada's or differing (VIII, 148) from it only by allowing fifteen years instead of ten for the assertion of the ousted proprietor's right, Vijnyaneshwara is forced to admit that the claimant cannot make any effectual answer to the possessor's plea. He has to fall back on the king's duty to administer justice honestly, a duty defined by Yajnavalkya (II, 1) as quoted by the Commentator himself (Macn. H. L., p. 135): "Let the monarch free from anger and cupidity.....adjudicate according to the Dharma Sastras."[2] The Sastras seem in this matter to be uniformly opposed to the Commentator. The other passage on the kings' judicial duty cited in the Mitak. (Macn. H. L. 183) is at Yajn. II, 19: "Let the king, rejecting subtleties (or rather perhaps sophistries or artifices, *chhala*, as in Manu VIII, 49 (Stenzler *die taüschung vertilgend*) try suits on their merits; but even merits avail not where proof fails,"[3] and then in sloka 27: "Title prevails over (mere) possession unless ancestral, but (itself) has no force where there is no possession" (or enjoyment)[4] (Stenzler "*Aber selbst erwerb hat keine kraft wenn gar kein genuss da ist*"), so that, however good the title, the Court must not adjudicate in

(1) नोपभोगे बलं कार्यमाहुर्चा तत्सुतेन, वा पशुस्त्रीपुरुषादीनामिति. (*Ibid.* f. 12, p. 1, l. 5.)

(2) व्यवहाराञ्नृपःपश्येत् ..... धर्मशास्त्रानुसारेण क्रोध लोभविवर्जितः (*Ibid.* f. 1, p. 1, l. 4.)

(3) छलं निरस्य भूतेन व्यवहाराञ्जयेन्नृपः भूतमप्यनुपन्यस्तं हीयते व्यवहारतः. (*Ibid.* f. 9, p. 1, l. 9.)

(4) आगमोऽधिको भोगादिना पूर्वक्रमागतात्, आगमेऽपिबलं नैव भुक्तिः स्तोकापि यत्नतो. (Mit. Vyav. f. 13, p. 2, l. 11 & 14, p. 2, l. 7.)

favour of it, unless it is thus made proof in the sense of the Hindu lawyers.

It is in the course of this discussion of the law of prescription that Vijnyaneshwara says that the preference accorded to the earlier of two mortgages, gifts, or sales by way of exception, is not to be understood as implying "the greater validity of the posterior act in a case of this description, provided that in this instance of landed property there have been twenty and in that of personal property ten years' possession, because in such acts (mortgages and the like) no subsequent transactions can really take place. A person is entitled to mortgage, give or sell his own property, but he has no proprietary right over things, already mortgaged, given or sold." (1) The effect of possession in these instances being probably a familiar case when Vijnyaneshwara wrote he saw that it would be brought to bear against his argument on the narrow operation of prescription, and he anticipates the objection by denying that it has a sound legal basis. As we have seen, however, possession has unquestionably been received as a ground of preference in the case of mortgages even by Vijnyaneshwara himself, and the forced and distorted character of the argument into which the passage we are now considering is introduced, deprives it of the respect otherwise due to it as an utterance of the author of the Mitakshara. His own Rishi Yajnavalkya, on the other hand, says: "Title is of no avail without some slight possession"—Yaj. II, 27. Narada says more emphatically: What a man is not possessed of, that is not his own, even though there be written proof and even though witnesses be living. This is specially the case with immoveables" (Jolly's Trans., p. 23). Vijnyaneshwara (Macn. H. L. 217) himself quotes Katyayana to the effect that "where there is not the least possession there a title is not weighty." (2) This he then paraphrases: "With what-

(1) नचैतन्मन्तव्यम्। आधिप्रतिग्रह क्रयेषुपूर्वस्याः क्रियायाः प्रबल्या पवादेन भूमिविषये विंशतिवर्षोपभोगयुक्तायाः धनविषये दशवर्षोपभोगयुक्ताया उत्तरस्याः क्रियायाःआबल्यमनेनोच्यत इति। यतस्तेषूत्तरैव क्रियातत्व तो नोपपद्यते। स्वयमेवह्याधे यन्देयं विक्रेयं च भवति। न चाहितस्य दत्तस्य विक्रीतस्यवास्वत्वमस्ति. (*Ibid.* f. 12, p. 1. 1. 7 *et seq.*)

(2) आगमेपि बलंनैव भुक्तिस्तोकापि यत्नतः. (*Ibid.* f. 14, p, 2, 1. 7.)

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soever title there is not the least occupancy, in that title there is no sufficient weight." (1) He then discusses the essentials of gift and acceptance, and admits that in the case of land, acceptance involves some little possession; otherwise the gift, sale, or other transfer is not complete. He might have quoted his own Rishi again. "The acceptance of a gift should be public, especially of immoveable property" (2) (Yajn. II, 176); but omitting this he goes on to assert, that where the priority of the admittedly incomplete transfer is ascertained "it affords the stronger evidence." "Stronger evidence" of what we may enquire, and the answer must be "of an inchoate as against a complete conveyance." It is plain, we think, that Vijnyaneshwara in his endeavour to give effect to a principle of abstract justice, not subject to those conditions of time and the practical needs of society which had been recognized as the natural basis of a law of prescription by the Rishis themselves, was led into a position which could not be defended without a series of the most arbitrary constructions of the texts. In the course of his argument he found that the generally received doctrine on possession in cases of competing securities was inconsistent with his theory, and so he proceeds to explain it away. He has not dealt with the case of rival vendees, one in and one out of possession, except under the influence of this endeavour to support a foregone conclusion; and that he felt the weakness of his own reasoning, is apparent from his immediately going on (Macn. H. L., 219) to admit that "the interpretation may be" that which we have in an earlier part of this judgment shown to be probably the correct one, one which sets aside Vijnyaneshwara's unpractical refinements in favour of the plain intention of the Smritis. At an earlier part of his disquisition (Macn. H. L., p. 199) Vijnyaneshwara quotes a passage of Katayana or Brihaspati, in which it is said that neither witnesses nor ordeals avail against possession in establishing the right to an easement. He does not try to reconcile this with his general principle, and yet it is obvious that the earlier title without possession or quasi-possession might in such

(1) यस्मिन्नागमे स्वल्पापि भुक्तिर्नास्ति तस्मिन्नागमेबलं संपूर्णं नैवास्ति, (*Ibid.* f. 14, p. 2, l. 8.)

(2) प्रतिग्रहःप्रकाशःस्यात् स्थावरस्य विशेषतः. (*Ibid.* f. 69 p. 1, l. 10)

cases conflict with a later title accompanied by possession, and according to the Smriti be defeated by it. But what is most conclusive against his argument in favour of bare title is that he himself distinctly abandons it in the passage we have already quoted on the subject of mortgages.

The doctrine of the necessity of a transfer of possession to complete a conveyance of ownership, to convert the right *ad rem* to a right *in re*, however harshly it would bear on particular persons where a different system has been established, is that which has been received into most systems of law, at least in their earlier stages of development. Its obvious convenience as a check on frauds and contentions has preserved it in the modern Roman law, even if this was not the source in which it originated—"*Traditionibus et usucapionibus dominia rerum non nudis pactis transferuntur*[1]" Co. lib. II, t. 3, s. 20; and this although "*emptio et venditio contrahitur cum de pretio convenerit quamvis nondum pretium numeratum sit*" [2]—Gaius III, 139 and although "*Nemo plus juris ad alium transferre potest quam ipse habet*"[3]—D., 1.50, t. 17, s. 54. As between the vendor and vendee the sale was perfected, the obligation of the contract was incurred; but the *dominium* of the land sold could not pass without a delivery for that purpose. In the modern French law a mere bargain transfers the property, but this has caused inconveniences which have necessitated the enactment in recent years (A.D. 1855) of a new law subordinating the proprietorship to real rights duly acquired prior to its registration or the transcription of the title. The effect of this has been, with regard to immoveables, to put a restrictive construction on the words of the Code Civil, Art. 1583: "*la propriété est acquise de droit àl' acheteur à l'ègard du vendeur, des qu'on est convenu de la chose et du prix.*"[4] An obligation rests on the vendor from that moment, but as regards third parties the

[1] Dominion (or ownership) over things is transferred by tradition (delivery) and usucapion, not by bare contracts.

[2] The bargain of purchase and sale takes place when an agreement about the price is concluded, though the price (money) itself may not yet have been paid.

[3] Nobody can convey to another more right than he himself possesses.

[4] The property passes according to law to the purchaser from the vendor, from the time they are agreed about the thing and the price.

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right *in re* is not constituted until the public act takes place. Blackstone, too, (vol. 2, p. 9) describes delivery of possession as an original requisite of a transfer of ownership: "The voluntary dereliction of the owner and delivering the possession to another individual amount to a transfer of the property.....the consent expressed by the conveyance gives Titius a good right against me, and possession or occupancy confirms the right against all the world beside." This may seem opposed to some of our familiar notions on the English law of contracts; but that it is not quite incongruous with a correct theory, may be inferred from the famous argument of Serjeant Manning in his note to *Bailey* v. *Culverwell*,[1] that a bargain and sale confers only a personal right, and does not transfer the property without delivery of possession. This is not received law, but the property that passes is still not absolute; the unpaid vendor has rights which enable him under circumstances to resume his *dominium* down to the moment that the *dominium* of the purchaser has been finally acquired along with the possession of the thing purchased. Bracton (b. II, f. 62) says distinctly: *sine traditione non transferuntur rerum dominia*;[2] see also per Sir T. Plumer, as quoted in 2 Wh. & Tud. 726, 3rd edn.

Without dwelling further on such analogies as these which might be greatly extended, we think it enough to say that they form cumulative testimony against the position that Vijnyaneshwara took up in opposition to the principles of his acknowledged masters on the particular subject that we are considering. But, then, the question follows, of how far he has been followed by other acknowledged authorities and by the customary law of this Presidency and especially of Guzerat. The Viramitrodaya merely echoes the Mitakshara on this as on most other points. The Vyavahara Mayukha (ch. II, sec. 2, accepts in part the Mitakshara doctrine as to prescription, but without adopting its rejection of possession, even long-continued, as fortifying a title. Nilakantha rejects the twenty years' prescription as itself conferring a title except to the mesne profits. As to the prescription arising from three descents, this, he says, must be supported by some colour of title. But as to possession supplementing a title

(1) 2 M. & R. 568.

(2) Without tradition (delivery) the dominion over things is not transferred.

as against a title not supported by possession, he quotes only the passage of Narada (Jolly, page 24) which we have already discussed. He apparently had not this particular competition present to his mind, for he does not dwell on it, but proceeds immediately to discuss the rules of prescription. He quotes Vyasa,(1) that "possession is five-fold, titled, long, continuous, uninterrupted, and known to the adverse party;" but as to the title which gives effect to possession for three generations, he says the possession may be "without a good title proper for attainment of property." What his opinion may have been as to an apparently good title supported by possession as against a prior naked title, he does not say; but if from beginning with the passage from Narada he is to be understood as adopting Narada's doctrine, he must be held to dissent from Vijnyaneshwara's favourite view, and to adopt the alternative one propounded on the authority of Narada by Vijnyaneshwara himself. In treating of the proof of easements, Nilkantha (Stokes, H. L. B. 25; Vyav. May., ch. I., sec. II., pl. 3) says that possession is superior to either documents or witnesses, which is more directly in contradiction to Vijnyaneshwara's principle of the inefficacy of possession than the Smriti as quoted by Vijnyaneshwara himself. As to mortgages, Nilkantha, though he accepts (Stokes, H. L. B. P. 31) the passages of Narada on which the Mitakshara relies, as preventing ownership arising from a dishonest or untitled possession, still does not find in them the same obstacle as his predecessor to assigning to a pledge with possession the preference over a pledge without possession (Stokes, H. L. B. 114). Should both creditors seek possession at the same moment, their rights are pronounced equal. In the case of a double hypothecation, the earlier act is to prevail. Nilkantha seems to take Katyayana's text as applying to bare hypothecation: Jagannatha in Colebrooke's Digest (b. 1, ch. III, t. 128, Comm.) makes it apply to the case where both creditors have had possession. In either case, possession completes a right which would otherwise be but imperfect as against third parties.

(1) सागमो दीर्घकालश्चाविच्छेदोपरवोज्ञिज्ञातः । प्रत्यर्थिसन्निधानञ्च परिभोगोपिपञ्चधेति (Mit. Vyav., f. 13, p. 2, l. 16.)

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From his treatment of these topics it is clear that Nilkantha did not adopt in its integrity the Mitakshara doctrine that under all circumstances the prior act must prevail in cases of gift, sale, and mortgage; and it may reasonably be concluded that, in quoting Narada's text on the efficacy of possession plus a title, Nilkantha intended to adopt the general doctrine on that subject of the Smriti from which the quotation was made.

Of the cases that have been decided on the law of sale at this side of India, the earliest that we have found reported, is that of *Nursing Bhánd* v. *Sunkurdás*.[1] There a vendee had executed a *satekhat* and paid earnest money; the remainder of the purchase-money was to be paid on the registration of a formal deed of sale. The vendee refused to complete. The sastris and the Court held that the vendor's right in the property was still untouched, because neither had the term expired, the money been paid, *nor the buyer's ownership commenced*. In the case of *Lallá Chooneelál* v. *Sawdehand Namedás*,[2] which was disposed of in 1835, the Privy Council held that the making of a *satekhat* so bound the property that the vendee could "demand a specific performance of the contract and the execution of such further assurances as might be deemed necessary to invest him with a complete legal title," although the vendee had not obtained possession and had not set up any claim until about a year after the attachment of the property in execution of a decree against the vendor. There is not in the judgment any discussion of the Hindu law; and not having in our library vol. III of the Privy Council Cases to which reference is made in 1 Morley's Digest, 106, we are unable to say whether it was even discussed in argument. But, so far as appears in the judgment, their Lordships merely applied the principle that after a contract of sale, though not completed by a conveyance, equity protects the land purchased from a vendee against a judgment-creditor's elegit (see *Benham* v. *Keane* [3] and the cases there cited). This is, of course, in no way decisive against the right of a purchaser without notice and in possession under a legal title, against whom equity gives no assistance to the holder of the prior equitable right. In the case of *Sibchunder*

(1) 1 Borr. S. D. A. Rep. 445. (2) 5 Cal. W. R. 111 P. C.
31 L. J. Ch. 129.

Ghose v. *Rasikchunder Neoghy*,[1] Sir L. Peel says: "The parties claiming under the judgment take not by contract or conveyance, nor have any agreed lien on the lands in suit. If they have a lien, it is by virtue of the *lex fori* and not of their personal law: it is not by virtue of the judgment but by virtue merely of the delivery of the writ of execution to the sheriff, and this is not by virtue of the Hindu law but of the *lex fori* merely; but by that law the deposit of the title-deeds gives a prior equity, and though the sale under the execution might give the legal estate, assuming the pledge to be invalid by Hindu law, yet as that purchase was after notice of the charge, it gave the judgment-creditor no priority." The dispute was between a judgment-creditor, who had purchased with notice in execution through an agent or trustee, and a prior mortgagee without possession; and it is plain that the position of the former claimant was, by reference to a general principle, supposed to be incorporated in the Law of Procedure, broadly distinguished from that of the *bonâ fide* purchaser without notice from an owner still in possession and transferring possession to the purchaser.

The reported decisions in recent years have, for the most part, turned on the effect of possession upon the validity, as against third parties, of a mortgage. In *Kundoojee* v. *Bállájee*[2] the opinion of the sastri was adopted, who said "that possession gives a deed of subsequent date undoubted preference over one of a prior date but without possession." In *Rámbuggut* v. *Sudánundráo*[3] the sastri of the Sadr Court gave a similar opinion, but the case seems to have been finally disposed of on the ground of the later deed's having been registered. In *Gopál Sudásiv* v. *Dinkar Abájee*[4] preference was given by the sastri and the Court to a deed of sale accompanied by possession over a prior mortgage without possession. As there was no doubt in that case as to the respective dates of the two transactions, it involved the adoption of the alternative interpretation proposed by Vijnyaneshwara instead of that more favoured by him, that "the simple prior title affords the stronger evidence" (Macn. H. L. 219). The sastri's

(1) 1 Fult. 36; see p. 61.
(2) Bell. S. D. A. Rep. 5.
(3) Bell. S. D. A. Rep. 9.
(4) Bell. S. D. A. Rep. 58.

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answer rests, as we have already seen, on a passage of the Mitakshara itself.

The next case that occurs is that of *Hormusjee* v. *Pándoorung*.[1] It might, perhaps, be a matter of some difficulty to reconcile this with the decision of the Privy Council to which we have lately referred, as it apparently places the attaching creditor in as good a position as a purchaser for value without notice; but the Court say distinctly: "The sale according to Hindu law would not be complete without possession being given," and reject the claim founded on the inchoate purchase. In *Rutunbharthee* v. *Kisunbharthee*[2] the appellant and respondent appear to have claimed under deeds of gift rather than by sale for valuable consideration from one Gyanbharthee. The respondent's deed was the earlier in date and was registered; but the Court held that the appellant's possession, acquired when the property had been attached under a decree against Gyanbharthee, gave his title precedence over the respondent's earlier one without possession. The case, as we have said, appears to us, from the report, to be one of competing deeds of gift; but no argument has been addressed to us on this point, and the language of the judgment is quite general—"The Court are of opinion that the alienation to Kisunbhartee without possession cannot be upheld by the Hindu law against Rutunbhartee's title with possession."

This was in 1857. The case of *Durgá* v. *Hurtá*,[3] which followed in 1860, was one of a prior purchaser without possession against a judgment-creditor, who, having sold the property in execution, had himself become the purchaser. The Joint Judge in regular appeal held "that the Hindu law does not make possession necessary for a good title as proprietor, though it does for a title as mortgagee. Under the Hindu law a proprietary title under a deed of purchase is as good without possession as with it;" but the judgment of the Sadr Court was as follows:—"The preliminary question, then, for the Court's decision is whether or not Durgá's (the judgment-creditor's) purchase with

(1) 3 Morr. S. D. A. Rep. 27. (2) 4 Morr. S. D. A. Rep. 44.
(3) 7 Harr. S. D. A. Rep. 342.

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possession takes precedence of Hurtá's purchase without possession, and, on reference to the sastri, they find that it does."

So far, whatever other objections might be raised against the decisions of the late Sadr Court, they seem to have maintained pretty consistently, under the advice of the sastris, that, for the creation of a real right generally available against a third party, a transfer of possession was essential according to the Hindu law. In *Rágho Bugdajee* v. *Vittoo*,[1] however, a different view was taken. The Court say: "Having referred the first two objections to the sastri of the Court, he has answered that, according to the Sastras, possession is not essential to the validity of a sale, neither is proof of full payment of the purchase-money, the latter being matter of arrangement between the vendor and purchaser." The case was one of a purchaser without possession seeking to raise an attachment, and it might be said that, on account of the distinction between a creditor and an actual purchaser for value, the decision is of little weight for a case of competing conveyances, but it is not certain that this distinction was recognized by the Sadr Court. It would be useful to know in what terms the questions were proposed to the sastri; but the reference is not preserved, so that it is no longer possible to say whether or not he understood that his opinion was called for on a case identical in substance with *Durgá* v. *Hurtá*,[2] and whether he assigned any reasons for giving an inconsistent interpretation of the law. In the absence of any information it seems almost safer to conclude that he meant to pronounce only on the validity of the sale as between the purchaser and vendor. In this sense the transaction was, no doubt, valid; indeed, there are texts (see Narada, Jolly's Transl., p. 59; Vyav. Mayukha, ch. IX, pl. 1; Stokes H. L. B. 133; Brihasp. Coleb. Dig., b. II, c. IV, t. 5 compd. with t. 17 Comm.) frequently cited, which say that a thing once even promised is inalienable except to the promisee. But if the sastri intended to say that delivery of possession was a wholly insignificant circumstance, he was in such direct contradiction to the Smritis and the commentaries as well as to previous responses, that without further authority it would not be at all safe to rely on his *dictum*. What is more important, though

(1) 8 Harr. S. D. A. Rep. 229. (2) 7 Harr. S. D. A. Rep. 342.

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but cursorily touched on in the report, is that the purchaser's conveyance having been registered, acquired, according to Act XIX of 1843, a preference over any unregistered title. According to *Rámbuggut* v. *Sudánundráo*[1] the purchaser with a registered conveyance must have been preferred, even though his deeds were subsequent in date to his opponent's title. It is reasonable to suppose, too, that in laying the case before the sastri so important a circumstance as registration was not omitted. If it was included, then the sastri may very well have applied to the case the principles applicable to a transaction authenticated by the presence of public officers. These, as may be seen from the commentary on Texts 35, 36, 37 of Colebrooke's Digest, b. II, ch. II, sec. II, give a considerable advantage to the purchase so fortified, even though the sale would otherwise be deemed invalid. In his commentary on bk. II, ch. IV, s. II, t. 28, Jagannatha says: "Contracts of sale, mortgage, and the like must necessarily be made in the presence of the king's officers and should be recorded by them."

The decision in *Bugdájee* v. *Vittoo*[2] was followed in *Nároo Hurree* v. *Wamnájee Konher*.[3] In overruling the decision in *Hormusjee* v. *Pándoorung*[4] the Judges make no reference to the case of *Durgá* v. *Hurtá*,[5] or to the earlier one of *Rutunbhartee* v. *Kisunbhartee*,[6] both of which were subsequent to *Hormusjee* v. *Pándoorung*. Perhaps they had overlooked these cases, whose authority, at any rate, can hardly be said to have been destroyed by a judgment which touched them only through being expressed in terms more general than was necessary for the adjudication in hand. If we take the decision as purposely omitting the discussion of these cases, because the case was distinguishable from them in the same way as *Hormusjee* v. *Pándoorung*, their authority remained wholly unaffected as to contests between rival vendees. The case was again between a purchaser and a judgment-creditor, and the Court say that the decision in *Hormusjee* v. *Pándoorung*, to which we have referred, is overruled by *Bugdájee* v. *Vittoo*.[7]

(1) Bell. S. D. A. Rep. 9.
(2) 8 Harr. S. D. A. Rep. 229.
(3) 8 Harr. S. D. A. Rep. 289.
(4) 3 Morr. S. D. A. Rep. 27.
(5) 7 Harr. S. D. A. Rep. 342.
(6) 4 Morr. S. D. A. Rep. 44.
(7) 8 Harr. S. D. A. Rep. 229.

No reference is made to the fact of registration in the latter case. No consciousness is shown of the cases of *Rutunbhartee* v. *Kisunbhartee* and *Durgá* v. *Hurtá*. This brings us to the end of the cases in the late Sadr Courts. The judgments, as reported, are as little informing as can well be conceived. They do not attempt to develope a rational theory out of the utterances of the native authorities, or to reconcile the apparent contradictions of the sastris. The conflicting answers obtained from these officers, were the whole records before us, would probably be found to illustrate the maxim *Prudens quæstio est dimidium scientiæ*;[1] but, taken as they stand, they leave on the mind a puzzling impression of uncertainty and of insufficient investigation of the subjects proposed for inquiry.

The first case in the reports of this Court is in no way more instructive. This is *Nágubái* v. *Motigir Guru*.[2] The plaintiff sued for possession of a house sold to her without possession. By whom it was sold, under what circumstances, how and when the defendants had come into possession, whether as successors, as seems likely, to the original vendor, as donees or as vendees with or without notice of a prior sale, on all these points the report is silent. The Court says: "A sale of property may be valid without possession." How far, against whom, and under what circumstances that validity exists, is not stated, nor can it be gathered from the report. If the doctrine really held by the Court at that time is to be gathered from the case next reported, it did not necessarily affect the relations between ordinary rival vendees from the same vendor. This was the case of *Bhukan* v. *Bháiji*[3] decided in the same month as *Nágubái* v. *Motigir*.[4] In this case, Bhukan, a prior purchaser of property sold in execution, was sued by the purchaser at the auction for possession. How he could be sued for possession unless he had obtained possession it is not easy to understand; but in the lower Courts judgment was given against him, because his "deed of sale was invalid, not having been followed by possession." The High Court, however, reversed this, holding "that by Hindu law a sale of immoveable property is valid, though not followed by possession; and as in

(1) Skilful inquiry is half knowledge.
(2) 1 Bom. H. C. Rep. 5.
(3) 1 Bom. H. C. Rep. 19.
(4) 1 Bom. H. C. Rep. 5.

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this case the sheriff's sale extended only to such right, title, and interest as Jorá might possess in the property in dispute, and this had already vested in Bukhan, Bháiji took nothing by his purchase from the sheriff." The Judges seem here to have been influenced by the opinion on which several more recent cases have been decided, that "the right, title, and interest" of a judgment-debtor, disposed of in execution, means not necessarily all that he could himself effectively convey, but his proprietary rights minus all equitable claims that could be enforced against him in respect of the property sold. As the Privy Council in *Lálla Chooneelál* v. *Saváechand*[1] had made the attaching creditor subject to the judgment-debtor's obligation, so now the purchaser in execution was placed in a similar position. This was directly opposed to *Durgá* v. *Hurtá*;[2] but the case arose under a different law of procedure, with a different description of the property offered for sale. So far as the expressions of the Court are strictly judicial, they may be understood as disposing of the case on a principle which does not affect the ordinary relations of rival vendees, one in and the other out of possession—a principle most distinctly set forth in *Mathurádás* v. *Káliá*[3]—"The purchaser at an auction sale in execution of a decree buys the right, title, and interest of the debtor, whatever that may be, burdened with all valid liens created by him. The precedent followed by the District Judge, therefore, does not apply, as it refers to private sales."

The precedent here referred to is that of *Ganpat* v. *Khandu*.[4] In this a prior mortgage without possession was not allowed to prevail against a subsequent sale with possession. The real or supposed equitable limitation of the execution-purchaser's rights, which prevented his gaining in *Mathurádás* v. *Káliá*[5] the advantage accorded to a purchaser in the ordinary course in *Ganpat* v. *Khandu*,[6] was equally applicable to the case of *Bhukan* v. *Bháiji*,[7] and must have governed the decision of that case, whatever view might have been held as to the rights of ordinary purchasers *inter se*.

(1) 5 Cal. W. R. 111 P. C.
(2) 7 Harr. S. D. A. Rep. 342.
(3) 7 Bom. H. C. Rep. 24 A. C. J.
(4) 4 Bom. H. C. Rep. 69 A. C. J.
(5) 7 Bom. H. C. Rep. 24 A. C. J.
(6) 4 Bom. H. C. Rep. 69 A. C. J.
(7) 1 Bom. H. C. Rep. 19 A. C. J.

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Girdhar Parjárám v. *Dáji*[1] is a case in which a vendee sued to recover property encroached on by a neighbour before his purchase. As the case was actually disposed of on the ground that the plaintiff had failed by production of a sale-deed to prove what were the precise boundaries of his purchase, that part of the judgment which is referred to in the head-note was, in strictness, extra-judicial. The judgment, however, begins thus: "Although, according to Hindu law, transfer of possession is not essentially necessary to give validity to a sale of immoveable property, yet it is essential that the vendor should have possession at the date of the sale." "Essential" to what, we may inquire: to a right against the vendor? or a right against all persons? These questions are answered in the judgment by saying that the vendee could recover damages from the vendor, and that he acquired "a right to sue for the land of which the vendor had been dispossessed." This, however, from the context must mean a right to sue, not the encroaching neighbour, but the vendor if he should recover possession, to make him complete the transfer, as in *Nanúbhái* v. *Tukárám*;[2] and thus the result comes out that, in the opinion of the Court, there might be a perfectly valid right, enforceable according to his capacity against the vendor, in respect of the property sold, which still was no right *in re* enforceable against a third party. No texts of the Hindu law have been brought to our notice, nor are we aware of any by which the inefficacy of a sale by an owner dispossessed can be placed on any other ground than the impossibility of completing the transaction by a transfer of possession. This transfer is "essential" as against a third party in every case; it is "not essentially necessary" against the vendor himself in any. It was on this view of the case that we in 1873 disposed of *Káchu Bayáji* v. *Káchabá Vithobá*.[3] It is not apparently quite reconcileable with the case of *Krishnáji* v. *Govind*,[4] where a mortgagee from A suing on an alleged violent dispossession of himself by B, but found never to have been in possession, was held capable of suing on his mortgagor's title within twelve years of his expulsion by the defendant; but the same principle was applied in *Govindá* v. *Rávji*.[5] There the

(1) 7 Bom. H. C. Rep. 4 A. C. J.
(2) Printed judgments for 1873, p. 186.
(3) 10 Bom. H. C. Rep. 491.
(4) 9 Bom. H. C. Rep. 275.
(5) S. A. 306 of 1876, p. 274 of printed judgments of 1876, not reported.

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Court says: "We quite agree with the Judge that transfer of possession is not essentially necessary to the validity of a sale of immoveable property. But this case, it appears to us, should be disposed of on other considerations. Both parties are innocent purchasers, and as such have an equal claim to the assistance of the Court; but the defendant having got into possession without notice of the prior sale, it appears that this Court, in accordance with principles of equity, should not interpose to disarm him, but should leave the matter as it stands." There is some little danger of misapprehension in adopting the language employed by Courts of equity in England, where there is or was a double system of Courts, in this country where there is but one; but if the substance of this judgment be compared with Vijnyaneswara's *dictum* (Macn. H. L. 203)—"A person.....has no proprietary right over things already mortgaged, given, or sold"—it obviously constitutes a rejection of it, except in the sense subsequently adopted by Vijnyaneswara himself:—"The first act resulting in possession, not an act, though prior, unaccompanied by acceptance, is to be deemed effectual." If the owner by a mere contract had divested himself of the *dominium* over his property, none could have remained to him to form the subject of a new transfer to the defendant. His permissive occupation under the plaintiff, when the latter had become complete owner, would make no difference, since this would rank, as against a third party such as the defendant, simply as the possession of the plaintiff himself—*Sakálchand Saváechand* v. *Dáyábhái Ichháchand*,[1] Col. Dig., bk. II, c. IV, t. 56, Comm. It repeats the general formula—"transfer of possession is not essentially necessary to the validity of a sale," but practically explains it as applicable only between the vendor and purchaser; as inapplicable between a prior purchaser on a naked contract and a subsequent purchaser with possession.

It is singular that in this series of decisions it is only the last which is distinctly a case between rival vendees free from any complication with the law of gifts, of mortgages, or of execution. In *Kullo* v. *Rámji*[2] the learned Judges say: "Verupax never

(1) 4 Bom. H. C. Rep. 71 A. C. J.

(2) Decided on the 9th September 1872; see printed judgments for 1872.

had possession, and, therefore, under Hindu law he was not in a position to sell the land to the plaintiff;" but it may be objected that there was a registered conveyance to the later purchaser, who must, therefore, have succeeded, even if the vendor had had possession, seeing that it had not been transferred to the plaintiff, who, consequently, had to stand upon his deed alone. The position of the attaching creditor has, in the decisions of the Sadr Adálat, been regarded in a very different view from that adopted by the Privy Council and the High Court; but, regarding him and the purchaser at an execution sale in the light of purchasers for value, the Sadr Court, we find, arrived, for reasons not reported, at directly opposite conclusions. In the case of mortgages it is admitted that the Hindu law makes a change of possession essential to their completeness, though on *Krishnáji* v. *Govind*[1] an opposite contention might possibily be founded; but it is said that the law being essentially different in the case of sales, the decisions on the one class of cases are not in any way applicable to the other. In *Ratunbhartee* v. *Kisunbhartee*[2] and perhaps in *Nágubái* v. *Motigir*[3] the decision may have turned on some peculiarity, if such there be, of the law of donation. In *Káchu* v. *Káchobá*[4] we said that "the texts cited" in *Harjivan* v. *Náran Haribhái*[5] "make a transfer of possession equally necessary to the completion of a sale as of a gift." If that is so, and if the cases that have arisen on the law of mortgage are not referrible to some principles different from those which govern sales, the decisions passed on the one class of disputes furnish important analogies, at least, for dealing with the others. It is worthwhile, therefore, to examine the question of their connection, or want of connection, with some care.

In *Harjivan* v. *Náran Haribhái* a donee sued to recover possession from the tenant of his donor. The tenant set up a permanent tenancy and a payment of rent to the donor after the date of the deeds which he said was a fabrication. In special appeal, Sir Richard Couch, C.J., said: "The question which we have to determine is, whether the Judge was right in holding that the gift was

(1) 9 Bom. H. C. Rep. 275.
(2) 4 Morr. S. D. A. 44.
(3) 1 Bom. H. C. Rep. 5.
(4) 10 Bom. H. C. Rep. 491; see p. 493.
(5) Bom. H. C. Rep. 31 A. C. J.

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not complete without delivery, and we are of opinion that he was;" and (in the conclusion of his judgment) "without possession or receipt of rent by the donee, the gift in this case was not complete." This was, it seems to us, an extreme case. The donee is told that the gift to him is invalid, because the tenant will not attorn to him. We are not aware that the Hindu law thus makes the capacity of a landlord or of receiver of a quit-rent to make a gift of his interest in the property dependent on the assent of the tenant in physical possession. The learned Judges in *Venku* v. *Jivu*[1] throw out, indeed, an opinion that the presence of a mortgagee in possession would so prevent delivery to the purchaser that no sale by the mortgagor could be complete; but this does not seem to rest on any recognized authority, though certainly contended for by some lawyers. In his commentary on Colebrooke's Digest, bk. I, ch. III, t. 134, Jagannatha says that the text is an answer to one who should hastily affirm that a pledge is absolutely invalid for want of possession, without neglect on the part of the pledgee, and the same argument is extended by him to the case of a gift. Colebrooke (Dig., bk. II, ch. IV, t. 18) says, as translated, that "a pledge must be disposed of by the law of pledges or subject to redemption," and the liberty thus allowed to the owner is not made dependent on the assent of the actual possessor, the mortgagee. If it were so, the sale in execution, subject to the mortgage approved by the sastri and by Colebrooke and Ellis at 2 Strange 461, could not be made, except with permission of the mortgagee. See also 2 Macn. P. and P. 307, where the right to sell an equity of redemption is fully supported by the sastri and the Vivada Chintamani, pp. 76 and 78 of the translation, which is still more clearly to the same effect. The difficulty to the Hindu lawyers, indeed, seems to have been in determining whether, as the mortgagor's ownership still subsists, his subsequent sale does not avoid the mortgage (see Col. Dig., bk. II, ch. IV, t. 28 and Comm.) The case of *Giriápá* v. *Narsápá*,[2] as explained in *Hari Ramchandra* v. *Máhádáji Vishnu*,[3] shows that possession by a tenant is equivalent to im-

(1) Sp. Ap. 500 of 1871, not reported, decided on the 11th of March 1872; see printed judgments for 1872.

(2) Morr. Sel. Dec. Pt. I., p. 96. S. A. 9972.

(3) Bom. H. C. Rep. 50 A. C. J.; see p. 54.

mediate possession by a mortgagee. In *Sákalchand* v. *Dayábhái*[1] it was held that the decision of the Munsif in favour of a donee ought to be affirmed if it were found that the resisting tenant had taken possession by the permission of the donor. A physical delivery of possession was wanting in this case as in the preceding one, but the possession of the tenant must have been regarded as that of the landlord, so that a mere intimation to him of the landlord's having transferred his right, effected a change of the possession as to the person on whose account it was held. In *Káchu* v. *Káchoba*[2] it is stated that, in accordance with the received practice, the judgment is not intended to affect the right of a mortgagor to deal with what is commonly called his equity of redemption; and there is no reason, that we know of, why notice of an assignment of a landlord's right should not be as effectual as notice of an assignment of an equity of redemption. The transfer of the physical detention is unnecessary and impracticable in the one case as in the other, because it is rightly held by the tenant or mortgagee in possession.

Taking the texts, however, which are quoted in support of the general principle, that "a gift is not complete without delivery:" in *Harjivan* v. *Náran*,[3] the first in order is an extract from the Mitakshara (Macn. H. L. 218) on which we have already commented at some length. If the able argument addressed to us by Mr. Shántárám is sound, the passage is governed alike as to gift and as to sale by what follows: "But such is the case only when of these two the priority is undistinguishable." If mere priority is the governing principle, possession cannot be, either for sales or gifts. By rejecting the qualification, as they might properly do, the learned Judges left the rule as to the necessity of possession equally applicable to sales as to gifts.

The next passage is from the Vyavahara Mayukha, ch. IX, pl. 6. It states what gifts may not be resumed, and it includes amongst these the price of things sold and wages paid, showing that "gift" like "give" was not used solely for gratuitous benefits. The text is, of course, cited to prove the necessity of delivery and acceptance to the irrevocability of the transactions enumerated.

(1) 4 Bom. H. C. Rep. 70 A. C. J. (2) 10 Bom. H. C. Rep. 491; see p. 494.
(3) 4 Bom. H. C. Rep. 31 A. C. J.

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The next quotation is from Jagannatha's Comment., Col. Dig. bk. II, ch. IV, t. 2. It says that "the term used by Manu (in speaking of subtraction of gift) denotes payment or delivery," which again involves the wider sense of "gift."

Then follows an extract from Brihaspati, which merely implies that a gift of what one is at liberty to bestow must be made effectual by actual delivery. The purpose of the whole passage is to distinguish what a man may from what he may not give away, not to determine the effect of possession.

The extract from Yajnavalkya, next cited, says that acceptance should be public. The context refers this directly to a gift in directing a wise man (like the passage from Brihaspati) to carry out his promise, but the formalities prescribed in the text next quoted in Colebrooke's Digest apply to conveyances for value equally as to deeds of gift.

The last passage referred to is from Jagannatha's Comm. on t. 56 of b. II, ch. IV of Colebrooke's Digest. It goes to show that, in Jagannatha's opinion, a gift made by a man, in consideration that the donee will perform the last duties for the donor, requires an entry into possession and a performance of the donor's purpose to make it effectual.

If, setting aside the preconceptions which beset those brought up in the midst of modern life, we look back to the earlier sources of the Hindu law, we find that the sale of land is not contemplated as possible, or is regarded as sacrilegious. This was by no means peculiar to the Hindus, as may be seen by a reference to many passages in the classical authors. The inseparableness of the family lands from the family to which they belonged was a favourite notion, indeed, almost throughout antiquity, both with the populace and with philosophers. In India it was connected with the recognized function of property as the support of religious rites beneficial to the family, as well as with the revenue system by which the king was largely interested in the land, so much so that Strabo supposed him to be the sole proprietor; and that his superior ownership is insisted on by the modern Jagannatha, who reconciles it with private property by setting

this down as of a subsidiary kind. The difficulties thus placed in the way of alienation fostered the natural attachment to the soil they had tilled, which the Hindus shared with other races of men, and which still makes them, in general, greatly prefer a mortgage or a lease with a fine to a sale. In Manu VIII, 245 ss., while the elaborate rules for the settlement of boundaries and the exemption of them from the general law of prescription indicate the sacred importance attached to them, no rules whatever are to be found regulating sales of land. A gift of land, however, is at the same time extolled (ch. IV, sl. 230), the sense of which is that the donor of land obtains the fruit of a gift of land as in Vyav. May., ch. IV, s. 1, pl. 8, the special religious merit of a "bhûdán," though even this—a gift to Brahmans—is by the secular-minded Narada (II, XVII, 46) made subject to the king's permission. The rules of sale in Yajnavalkya (II, 254 ss.) are obviously meant for transactions in moveables, and the old passage cited by Vijnyaneshwara at Mitak., ch. I, s. 1, pl. 32—"In regard to the immoveable estate sale is not allowed, it may be mortgaged by consent of the persons interested"[1]—points to a state of things anterior to that when Narada (see Jolly's Transl., p. 70) included both moveable and immoveable property in things vendible, and when Brihaspati (Vyav. May., ch. II, s. 1, pl. 2) described a deed of purchase of "a house, field, or the like." Passages pointing to the inalienability and even to the impartibility of ancestral property in ancient times may be found in the Smriti Chandrika, chap. VII, para. 44, etc.

A sale being thus disapproved and a gift approved (Manu IV, 235), it was natural that, as sales became necessary, the fiction of a gift should still be preserved in the ceremonies attending them. "If a sale must be made," says Vijnyaneshwara, "it should be conducted for the transfer of immoveable property in the form of

[1] स्थावरे विक्रयोनास्ति कुर्यादाधिमनुज्ञयेति. (Mit. Vyav. f. 47, p. 1, l. 3.) See the note of Mr. Ellis at 2 Strange H. L. 461. In Attica, where the sale of land was hardly possible in the earlier times, hypothecation, according to Sir W. Jones (Essay on Bailments), originated. It was indicated in each case by a pillar erected on the property; and, to clear the way for his further legislation, Solon caused these tokens of general insolvency to be thrown down (Grote's Hist. of Greece, vol. 3, page 100).

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a gift, delivering with it gold and water."[1] This is part of the series of forms prescribed by the text (Coleb. Dig., b. II, c. IV, t. 33) already referred to (land is conveyed by six formalities, &c.), and shows that it is as applicable to sales as to gifts—sales being, in fact, included in gifts of land as viewed by the Hindu law. In the Smritis cited in Coleb. Dig., b. I, ch. III, t. 133, 134, gifts, sales, and mortgages are put on precisely the same footing with regard to the effect of possession; and in commenting on the former, Jagannatha says: "There is no difference in the divestiture of property by gift and sale." In the comment on b. II, ch. IV, t. 17, he says: "'Sold' is employed in the text of Narada in the comprehensive sense of given or otherwise aliened," and on b. II, ch. IV, t. 28, he quotes Raghunandana to the effect that "the word 'sell' also denotes gift annulling property," just as Chandeshwara, quoted in t. 8, says that "'give,' having a secondary sense, without losing its literal meaning, comprehends sale and the like." Extracts of this kind might be multiplied showing that, for the purpose of divesting an owner of property, gift and sale stand on precisely the same footing, and are subject to the same conditions. Sir T. Strange (H. L., vol. I, 24) speaks of "gift embracing ..... every species of conveyance and charge;" and as "possession is, at least, equally necessary in the case of a gift as of a pledge" (*per* Seton, J., in *Sibchunder* v. *Russickchunder*),[2] so it seems equally necessary to the completion of a transfer by sale as by gift in our sense of those words.[3]

(1) विक्रयेपि कर्तव्ये स हिरण्य मुदकंदत्वा दानरूपेण स्थावर विक्रयं कुर्यादिति (*Ibid.* f. 47, p. 1, l. 5.) See *Chassan Symbolique de Droit*, 96, quoting *Reyscher Symb. des Germ. Rechts* 45.

(2) Fullon 40.

(3) Gift and sale were assimilated in the development of the English Common Law, though to an end exactly the reverse. In *Wortes* v. *Clifton*, Lord Coke says: "The civil law is that a gift of goods is not good without delivery, but it is otherwise in our law"—Rolle Rep. 61. In commenting on this Lord Blackburn (Contract of Sale, 197) says: "It does not seem to me that the word 'done' (*donum*) in law French does import *primâ facie* that the transaction was gratuitous." The word "gift" that is was made to include a sale; and that, conversely, a mere parol gift in the proper sense, even without delivery, confers a property subject to retraction by the donor, appears from the note (d) to 2 Wms. Saunders, 476.

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It seems to us, then, that we are justified in adopting the conclusion of so eminent an authority as Mr. Ellis (Mirási papers, p. 205), who says "that by the old law, though land might be temporarily transferred by mortgage or permanently by gift, it could not be sold, (but) that according to the interpretations of the commentators..... the sale of it is allowed, the word *danam*=donation being construed to signify any act of divestiture." Instead of disguising his gift under the form of a sale, the Hindu was constrained by his law to conduct his sale with the ceremonies of a gift.(1) The delivery and acceptance of possession, therefore, which, where they are possible, have been held essential to a transfer by gift, must be equally essential to the completion of a sale in the removal of the *dominium* from the vendor to the vendee.

There is a case in which at 2 Borr. 561 the sastris say that a gift in Krishnarpan is valid, though possession be retained by the donor. For this opinion, however, they cite only Mitak., chap. I, sec. I, pl. 8, which says that acceptance of a gift is a recognized mode of acquisition for a Brahmin, and a passage, whereby, according to the Brihat Parijat, "if the donor should not think upon what he has given and the donee should not demand it, they both go to hell, the giver and also the receiver." This relates to the binding obligation to deliver what has been promised—(see Narada, Jolly's Transl., p. 59, quoted Vyav. May., ch. IX, pl. 2), and is an emphatic condemnation of any neglect of the duty inculcated in Manu IV, 235, and the Smritis quoted (Coleb. Dig., b. II, ch. IV, t. 41), by which the donor's spiritual welfare might seriously suffer. So far the promissor is bound (Coleb. Dig., b. II, ch. IV, t. 16, 17 Comm.), and, except for things idly promised, the heir is deemed responsible (Vyav. May., chap. V, sec. IV, pl. 15, and chap. IX, pl. 10); but this responsibility, like that of the original promissor, is not a right in the property promised. If it were, the property would be equally bound in the hands of the heirs for the former owner's debts, which also the heirs are enjoined to pay (Vyav. May., ch. V, s. 4, pl. 14). But as to these no right *in re* is vested in the creditors against the property of the deceased. It is not so

(1) No sale of immoveable property can be effected without the formalities of donation, Coleb. Dig., b. V, ch. VII, t. 390, note.

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hypothecated as to prevent the heirs disposing of it—*Jamiyatrám* v. *Parbhudás*;[1] neither, therefore, is the bare promise of the deceased, unaccompanied by an actual delivery of possession, more than a moral obligation on his successor. It is placed by Jagannatha (Coleb. Dig., b. II, ch. IV, t. 46, Comm.) as at the highest on the footing of a debt. The gift, therefore, in the case in Borradaile, as in so many other instances of contract, is to be considered valid only as creating what Harita calls "a debt of conscience" in the donor and his representatives, not an ownership in the thing promised available against third parties.

In our remarks on the case of *Rágho Bugdájee* v. *Vittoo*[2] we have pointed out that, even according to the received principle of the Hindu law, the registration of an assurance may be deemed to give it a scope of validity which it would not otherwise have. In *Hari Rámchandra* v. *Máhádáji*,[3] it is said, after a review of the precedents, "that in the Konkan the registration of a mortgage without possession cures any defect or imperfection which arose from the non-completion of the transaction by delivery of possession;" and Melvill, J., in commenting on this in *Itchárám* v. *Ráiji*,[4] says: "If one kind of notice be sufficient to satisfy the rule of Hindu law, why should not another kind of notice? I conceive that the true principle is that laid down in *Gopál* v. *Krishnáppá*,[5] and that the present case comes under the class of constructive frauds." As regards this last case, it is to be observed that the sale took place when a decree had already been made, giving effect to the mortgagee's lien on the property. This converted his right against the person into a right *in re*, and of this he could not be deprived by any act of his mortgagor. As to the case of *Hari Rámchandra* v. *Máhádáji*, the object of the various ceremonies prescribed for the transfer of land, though probably they originated from quite different causes, is now recognized by the Hindu lawyers to be mainly the publicity of the transaction. In Coleb. Dig., bk. V, ch. VII, t. 390, Comm., Misra is quoted to the effect that "the assent (or acknowledgment) of townsmen, of heirs, and of kindred, is required for the publicity of the gift."

(1) 9 Bom. H. C. Rep. 116. (2) 8 Harr. S. D. A. Rep. 229.

(3) 8 Bom. H. C. Rep. 50 A. C. J.; see p. 54.

(4) 11 Bom. H. C. Rep. 41; see p. 43. (5) 7 Bom. H. C. Rep. 60 A. C. J.

Further on Jagannatha says:—"There is no objection to the admission of any other ceremony as well as the delivery of gold and water in the case of sale;" and, finally, "sale (*i.e.*, the contract) is incontestably effected by a simple act of volition, but formality is ordained for the sake of proof,"—proof, that is, in the sense of preappointed evidence or an indication having a conclusive or special effect. That a symbolical delivery will, in the appropriate cases, suffice, appears from the note of Mr. Ellis in 2 Strange H. L. 468. Where, therefore, there has been a public avowal of a sale, gift, or mortgage by registration, the transfer appears to be completed. The change of ownership proclaimed to all perfects a right available against all; in other words, a real right instead of one "*in personam.*" The effect of notice of a prior contract to the individual purchaser or incumbrancer seems to rest on a somewhat different principle. In such a case there has not, unless the requisites have been fulfilled, been a complete transfer of the real right; but the second contractor, taking with notice of the prior dealing, is not allowed, as we have seen, by the Hindu, any more than by the English, law to profit by his share in the vendor's fraud. Although, therefore, the conveyance to him may have been completed, he is subject to the rule exemplified in *Potter* v. *Sanders*,[1] and may be compelled to re-convey to the prior vendee. But the necessity, according to the English system, for this re-conveyance, shows that the first vendee, however strong his abstract right so as to justify the action of equity "*in personam*" for his benefit, has not a real right in the property; that has passed to the second vendee by the conveyance, to which, by statute, is fictitiously annexed a transfer of the possession.

It appears to us, upon a consideration of the very few cases directly in point, and of the much larger number affording analogies for the determination of the question now before us which are presented by the reports of the late Sadr Court and of the High Court of Bombay, that the weight of authority preponderates greatly in favour of the necessity of a transfer of possession, as the necessary complement of a contract, in order to effect an absolute change of ownership by sale. The transfer of possession

(1) 6 Hare 1.

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may be replaced by registration or by a decree giving notice to all of the change; but, in the absence of some such public indication, the only right acquired by a vendee, as by a mortgagee or donee, is one of an equitable character enforceable only against the vendor and those taking under him with notice, not against purchasers or sub-purchasers in possession without notice, whose legal title, fully acquired, cannot be cancelled by the Courts, on the ground of dishonest or unconscionable means having been used in acquiring it.

Not many cases from the other presidencies have been referred to in argument. In *Pránkrishná Dey* v. *Biswámbhar Sen*[1] it was held that a lessee from a claimant of lands, held by persons denying his title, might sue those persons for possession under his lease. The Court says: "The lease gave to the plaintiff a right of possession, assuming that the lessors had a right of possession but were not in possession." The operation of the Hindu law is not recognized or alluded to in the judgment. It merely brings into India the English action of ejectment without its historical justification, or the safeguards, such as they were, which the practice of the Courts had thrown round that proceeding in the country of its origin. The fictions of the demise to the nominal plaintiff, his assumed entry, his ouster by the casual ejector, all rest on the necessity, under the older common law, of an actual possession by the owner to enable him to make a good demise. It was by the 'consent rule' that the person actually in possession being forced to admit a string of falsehoods as the condition of being allowed to defend his right, was brought face to face with the real claimant on the ground of the title set up by the latter. And, after all as is said in Cole on Ejectment, p. 77, "As a general rule a judgment in ejectment does not conclude the title .....an unsuccessful claimant may immediately commence another ejectment in the same or another Court.....or a defendant, against whom a judgment has been obtained, may immediately commence an ejectment against the previous claimant or his tenant to recover back possession of the land .....Indeed, this is frequently done." In the case of *Pránkrishná Dey* v. *Biswámbhar Sen* the lessors appear to have sought, by means of

(1) 2 Beng. L. R. 207 A. C. J.

the lease, to procure an adjudication in their favour on a suit for an insignificant portion which they might afterwards employ in suing for an extensive property. If the first lessee failed, another one might be set up, and the holders of the estate be involved in an endless series of harassing contests. The Hindu law affords no warrant, that we know of, for such a course as this. As the ground of a complaint against a defendant, a plaintiff may properly say: "He has forcibly seized my land" (1) (Mitak., sec. II, pl. 4; Macn., H. L. 142) but not, so far as appears, "He holds land contrary to the right of another who has proposed to transfer that right to me." The Hindu law requires the plaintiff to show that he has been "aggrieved" or "injured" (Mitak., Macn. H. L. 141, 151), and the person injured is he who has been dispossessed, not he who has bought from A, land in the adverse possession of B. Under the Code of Civil Procedure it might be said that the lessor being made a co-plaintiff, the question of right as between him and the defendant or the defendant's lessors might be finally determined; but, in the judgment we are considering, it is laid down that "the Court cannot compel a man to become a plaintiff against his will." A competent critic says "that persons sensitive to the harmonies of jurisprudence will lament that, instead of cleansing, improving, and simplifying the true proprietary actions, we sacrificed them all to the possessory action of ejectment, thus basing our whole system of land recovery upon legal fiction."—(Maine's Anc. Law, 3rd ed., p. 292). Our Code of Procedure, not contemplating such a case, has made no provisions, such as exist in England, for checking repeated actions of ejectment by payment of costs of past suits, and giving security for those of the proposed suit. A series of paupers might be set up as plaintiffs, and the defendant thus litigated out of his means without any effectual remedy. As, therefore, the parting with a portion of his estate by a pretended owner out of possession really involves the same principle, as to the right acquired, as the sale of his whole interest, we prefer, in so far as it bears on the question before us, to adhere to the ruling of this Court in the case of *Harjivan* v. *Naran*

(1) क्षेत्रादिकं ममापहरतीति (Mit. Vyav. f. 2, p. 2, l. 2.)

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Haribhai[1] which has been followed in several subsequent cases of sale, such as S. A. 528 of 1873, and S. A. 534 of 1873, as well as in *Káchu* v. *Káchobá*.[2] If, indeed, the vendor may be joined like a perverse or an intriguing trustee, even against his will, as co-plaintiff with his vendee, the case is considerably altered; but the possibility of this, as we have seen, is denied. The case of *Bikán Singh* v. *Mussámut Parbutty Kooer*[3] points the other way. The distinction drawn in that case, however, between a vendor who has never got possession as unable to convey a title that can be sued on, and a vendor once in possession but ousted, who it is said can make such a title, rests on considerations which do not appear to us to have any great force in the sphere of Hindu law. In *Tárá Soonduree* v. *The Court of Wards*[4] Sir R. Couch, C.J., construed the principles laid down by the Privy Council, in the cases to which we shall presently refer, as an "express authority" against the maintenance of a suit by a vendee deriving title from a claimant of a moiety out of possession at the time of the transaction against the person in possession, as the latter and those under whom he claimed were no parties to the deed. This is to the same effect as *Káchu* v. *Káchobá*,[5] elsewhere referred to in this judgment. The principle is reaffirmed by the same learned Judge in *Bishonáth Dey* v. *Chunder Mohun Dutt*.[6]

The second Calcutta case, relied on for the appellant, is that of *Gungahurry Nundee* v. *Rághubrám*.[7] In that case a purchaser from an ousted member of a joint Hindu family sued the other members for possession, and it was held that possession by the vendor was not necessary to make the sale perfect, as, according to Markby, J., "the general rule has been adopted in India that in the case of purchase and sale the ownership is acquired by the purchaser, though the transaction has not been followed by delivery," and that "delivery is not generally necessary for a transfer of ownership." On the observations of the Privy Coun-

(1) 4 Bom. H. C. Rep. 31 A. C. J. (2) 10 Bom. H. C. Rep. 491.
(3) 22 Calc. W. R. 99 Civ. Rul.
(4) 20 Calc. W. R. 446 Civ. Rul.; see p. 448. (5) 10 Bom. H. C. Rep. 491.
(6) 23 Calc. W. R. 165 Civ. Rul. (7) 14 Beng. L. R. 307.

cil in *Rájá Sáhib Perhlád Sein* v. *Báboo Budhoo Sing* [1] the learned Judge remarks: "It cannot be denied that the doubt, here expressed, goes to the full extent of raising the question whether '*in any case*' the ownership could be acquired without delivery. Nor can it be for a moment contested that these observations are unimpeachable in theory," but he considers that they have been "displaced to a very large extent"....."by legislation or recognized practice." This was the question for decision; but the learned Judge was correct in saying that their Lordships' judgment did not necessarily involve the proposition that delivery was in all cases necessary to a transfer of property. Their remarks amounted only to a *dictum* on a point raised and maturely considered in the case, though not the one on which its decision turned. The same may be said of the adoption of these remarks in *Ránee Bhobosoondree Dasseah* v. *Issurchunder Dutt.* [2] The remarks in each case, though not decisive of the cause, were on a point pertinent to the controversy, and claim the respect due to all expressions proceeding from the highest tribunal.

In his observation that the remarks of the Privy Council have been displaced by a "recognized practice," Markby, J., cannot, we suppose, have meant "judicially recognized," for he says shortly afterwards: "This is the first time the Court has been called upon directly to decide this question." In his judgment in *Sálim Shaikh* v. *Boidonáth Ghuttuck* [3] the learned Judge had quoted the Mitakshara—"With whatsoever title there is not the least occupancy, in that title there is no sufficient weight" (Macn. H. L. 217)—in support of the efficacy against a subsequent registered grant of land of a prior oral grant accompanied by posses-

(1) 12 Moore I. A. 275:—"They (the Judges of the Sadr Court) seem to have ruled that the effect of the execution of a bill of sale by a Hindu vendor is, to use the phraseology of English law, to pass an estate irrespectively of actual delivery of possession; giving to the instrument the effect of a conveyance operating by the Statute of Uses. Whether such a conclusion would be warranted in any case is, in their Lordships' opinion, very questionable. It is certainly not supported by the two cases cited in the judgment under review (*Gopichurn Kurr* v. *Koroonú Dásee* and *Surbonárain Singh* v. *Máhárúj Singh*), in both of which actual possession seems to have passed from the vendor to the purchaser. To support it, the execution of the bill of sale must be treated as a constructive transfer of possession. But how can there be any such transfer, actual or constructive, upon a contract under which the vendor sells that of which he has not possession, and to which he may never establish a title?" (See pp. 306 and 307.)

(2) 11 Beng. L. R. 36.

(3) 12 Calc. W. R. 217 Civ. Rul.

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sion where one unaccompanied by possession would fail. Nor could he have meant any custom established in the case as there is no reference to such a thing in the arguments or elsewhere in the judgment itself. How the practice, therefore, was "recognized," we cannot see. The "legislation" to which the learned Judge refers, is the Indian Registration Act. That registration supplies a defect of possession, we think, is true; but that it follows as a consequence that a written contract at once changes the ownership, we cannot perceive. The Act was, we think, framed to meet the cases both of contracts creating an obligation and conveyances transferring ownership, not to alter or affect the general law, except so far as this was involved in the preference given by its provisions to registered documents over unregistered ones. "It is true," the learned Judge says, "that a certain advantage is given to a purchaser who has obtained delivery, but that does not show that such a purchaser had this advantage independently of the Act. It rather points the other way." The truth, however, is, that such a purchaser *had* this advantage—the learned Judge's previous judgment, lately referred to, proves this, as does also, in this Court, *Fakirápp*a v. *Chinápp*a, S. A. 313 of 1871—and the Act only confirmed it. There was no such provision in the prior Registration Acts XVI of 1864 and XX of 1866; and under the former of these it was at one time held (see *Gooroo Dáss Daw* v. *Kooshoom Koomáree*[1] as it had been in one or two cases under Act XIX of 1843, that a subsequent deed registered took priority over a previous one unregistered, even when accompanied by possession. The hardship of this, however, and the insecurity which it created being recognized, it was afterwards ruled[2] that an unregistered and even an oral title completed by possession could not be displaced by a subsequent registered title without possession. In Act VIII of 1871 a registered document still takes effect against an unregistered one *per se*, but the rulings of the Courts are adopted in the sense that an oral agreement is made available against a registered title where the former is accompanied by possession. It is not express-

(1) 9 Calc. W. R. 547 Civ. Rul.

(2) 10 Calc. W. R. 65 Civ. Rul.; (3) Beng. L. R. 312 A. C. J.; 9 Bom. H. C. R. 121; *Ib.* 147; 12 Calc. W. R. 217 Civ. Rul., per Markby, J.

ed that the same effect is to be allowed to an unregistered written as to an oral agreement; but in the case of *Kirtychunder* v. *Rájchunder*,[1] Sir R. Couch, C.J., puts them on the same footing. He thinks that the Legislature intended to adopt the rules recognized by the Courts. As, therefore, the purchaser in possession had the advantage independently of the Act, the argument drawn from the contrary supposition, that every Hindu contract for land was meant to operate like a conveyance under the Statute of Uses, appears to us to be seriously undermined.

Mitter, J., in the same case maintains the same proposition. The learned Judge thinks "there is no provision in the Sastras which can be quoted in support of the contrary doctrine," and he relies in support of his own view on those passages of the Mitakshara and of Narada which we have already discussed. Neither he nor his learned colleague make any reference to that quotation from the latter by the Mitakshara in an opposite sense to which we have lately referred. But both he and Markby, J., make a reserve in favour of the purchaser in possession. The latter says: "It may also, when a question arises as to which of two honest purchasers has the better title, be important to consider who has got possession." While Mitter, J., thinks that although the title of a purchaser "without delivery of possession is complete," yet "the holder of its labours under certain disadvantages as against a person who acquires a title accompanied by possession." These reserves cover the case with which we have now to deal; but we may observe that if the former of two contracts is, as the learned Judges maintain, a complete conveyance, there can be no competition, in the sense intended, of a better and a worse title determined by possession. There can be but one title, which, forthwith creating absolute ownership in the purchaser, leaves to the vendor no other title better or worse than he can confer; the second pretended purchaser cannot "acquire a title" except from the first. Vijnyaneshwara's reasoning on this point is irrefragable when once the premise is granted, which the learned Judges concede, that the mere contract constitutes for the purchaser a right *in re*.

(1) 22 Calc. W. R. 273 Civ. Rul.

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The learned Judges support their decision by an argument drawn from the Statute law, which does not appear to us, with deference, to have at all the force which they apparently ascribe to it. It is that the Registration Act and the Code of Civil Procedure contemplate a state of the law in which the mere contract creates a title, and, therefore, as we understand, that this must needs have been the law generally in India. As we understand the matter, a new law innovates no more than is necessary for its own proper operation, and this is especially the case with laws like those as to forms and procedure of a purely positive character. The mere circumstance that they would work more harmoniously with one system than another is not a reason for implying a repeal of the latter, supposing it to have been the previously subsisting law, unless there be an actual repugnancy. Here the Registration Act gives to certain documents a special advantage, but is not meant, we apprehend, to modify the general law of sale any further. The Code of Civil Procedure confers some special advantages on purchasers in execution, without which they could hardly realize what they had bought. So in England, under Statute 27 and 28 Vic., c. 112, a judgment-creditor who has to go to an equity Court to get his charge established, acquires advantages counterbalanced by disadvantages from the alteration made by that statute in the law of procedure (see *Hatton* v. *Haywood*,[1] *Beckett* v. *Buckley*[2]) without any further general disturbance of the law. The Code of Civil Procedure, though it stands in the way of a particular class of benami transactions, does not affect their general legality—*Mussamut Buhuns Kowur* v. *Lálla Buhooree Lall*.[3] The new law justifies such decisions as those in *Govind* v. *Govinda*.[4] They are necessary to give full effect to the particular provisions of the law which they apply, and which have so far superseded the older law. On the same principle the Courts permit a judgment-creditor of a member of a joint Hindu family, and the purchaser of his rights in execution, to avail themselves of the whole right, title, and interest which the law assigns to them. Under the pressure of a course of decisions this Court has even allowed to the purchaser of an undivided share from a co-parcener

(1) L. R. 9 Ch. Ap. 229.
(2) L. R. 17 Eq. 435.
(3) 14 Moore I. A. 496.
(4) I. L. R. 1 Bom. 500.

a suit against the other co-parceners for partition, which the Hindu law would not have permitted; but, viewed as touching the operation of Hindu law within its proper province, these and similar modifications are to be regarded as anomalous, exceptional provisions, admitted on special grounds, and the rule applies *Quod contra rationem juris receptum est, non esi producendum ad consequentia.* (1)

The case of *Gungáhurry* v. *Rághubrám* (2) is referred to approvingly by Mitter, J., in the subsequent case of *Nittyánund* v. *Shámá Churn.*(3) Ainslie, J., rested his judgment on *Bikán Singh* v. *Mussámat Párbutty.*(4) But the ground, taken three days afterwards, in *Bishonáth Dey* v. *Chunder Mohun Dutt* (5) by Sir Richard Couch, Chief Justice, as established by the Privy Council, appears to us, if admitted, to deprive both the other cases of authority.

The case of *Lokenáth Ghose* v. *Jugobundhoo Roy* (6) rules that a *patnidár* out of possession may grant a *dar-patni*, on which the *dar-patnidár* may sue the adverse holders for possession. The judgment is based chiefly on *Gungáhurry* v. *Rághubrám* (7) which we have just discussed, but that of *Pránkrishná Dey* v. *Biswambar Sen* (8) would seem to furnish a closer analogy. What we have said on that case applies equally to *Lokenáth* v. *Jugobundhoo.*(9) "In none of the cases relied on by the appellant," says L. Jackson, J., "has it been held that a transfer of property, of which the transferor is not at the time of such transfer in possession, would be *ipso facto* void." Not "*ipso facto* void" according to the views expressed in *Girdhar* v. *Dáji*,(10) as it would constitute an obligation on the transferor, but inefficacious to convey any right of action against a person holding adversely to him.

The effect of these cases is not, in our opinion, to show that the tendency of this Court's views on the same class of questions has been founded on any obvious error or misconception of the Hindu authorities. The numerous cases under the Registration Acts

(1) What is admitted against the reason (general theory) of the law, is not to be extended to its (logical) consequences.

(2) 14 Beng. L. R, 307.
(3) 23 Calc. W. R. 163 Civ. Rul.
(4) 22 Calc. W. R. 99 Civ. Rul.
(5) 23 Calc. W. R. 165 Civ. Rul.
(6) I. L. R., 1 Calc., 297.
(7) 14 Beng. L. R. 307.
(8) 22 Beng. L. R. 207 A. C. J.
(9) I. L. R., 1 Calc., 297.
(10) 7 Bom. H. C. Rep. 4 A. C. J.

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cited with approval in *Bálárám* v. *Appá*,[1] assigned to possession a differentiating effect in perfecting a title otherwise defective, so as to guard it against subsequent registered transactions, which is, in our opinion, quite inconsistent with delivery's being a merely nugatory ceremony, adding nothing to the bare agreement. In so far as the Calcutta judgments rest on usage, which is explicitly made a ground for the two latter of them, it is enough to say that the custom of Bengal and of Bombay differs on so important a point as the necessity of possession to constitute a complete mortgage or gift, and it has not been shown to us that a sale of land in this presidency stands on a different footing, through established usage, from the other two contracts with which the ancient authorities link it.

We have seen that, under section 50 of the Registration Act VIII of 1871, a registered document "takes effect" against an unregistered one relating to the same property. By section 48 it "takes effect" against an oral agreement "unless where the agreement ... ... has been accompanied or followed by delivery of possession." This saving has been recognized at Calcutta as extending to unregistered written agreements accompanied by possession obtained under them, so as to afford a public indication of the transfer of rights, though in *Bálárám* v. *Appá*[2] the learned Chief Justice of this Court preferred to reserve the question until a necessity should arise for disposing of it. But the questions remain—(1) of whether the agreement, even unregistered, which is thus fortified, is meant to prevail against the registered title if, though the sale and delivery are prior to the registration, they are subsequent to the execution of the registered instrument; (2) of what is the position in such a case of the holder under a registered instrument against a claimant under one of prior execution registered but without possession?

As to the first of these questions, it is plain, we think, that the words "take effect" have the same meaning in section 48 as in section 50. As used in the latter, they can operate only by depriving unregistered instruments of efficacy in so far as this

(1) 9 Bom. H. C. Rep. 121. (2) 9 Bom. H. C. Rep. 121; see p. 146.

would interfere with the efficacy according to its true intent of the registered document—and only instruments of prior date could, *per se*, have this effect. It would not have needed any special legislative enactment to provide that an earlier registered document should prevail against a later one unregistered. So, therefore, we think that the preference accorded in Act XX of 1866, section 48, to registered contracts over oral ones, was meant to refer—could refer practically—only to prior oral contracts, and that the provision in Act VIII of 1871, section 48, is to be referred to the same point of time. All registered instruments take effect against oral agreements except where these have been carried out by a delivery of possession, and have thus effected a change of ownership, before the execution of the registered instrument; from which time, as provided in section 47, it begins to operate, and, therefore, so far as may be necessary for its operation, extinguishes any inconsistent contract. The registered instrument, in fact, takes effect as if registered on the day of its execution, and no bare title which has not then ripened into complete ownership can subsequently do so, except subject to the registered instrument. The first question, then, we should answer in the negative.

In the second question the competition is no longer between a registered and an unregistered title. Both are registered. Sections 48 and 50 of the Registration Act, therefore, do not operate. What is left is section 47, under which "a registered instrument shall operate from the time from which it would have commenced to operate if no registration thereof had been required or made." The priority as between two instruments, such as those in the present case, is thus referred to their time of operation, apart from the Registration Act. They "operate," too, apart from the extinctive properties conferred on each of them by sections 48, 50 as against unregistered instruments. It seems to us that they must be weighed against each other according to the Hindu law, by which, except as modified by express legislation, it is admitted that the rights of the parties are to be governed. Applying this standard, however, the circumstance that Táráchand at once got possession under his deed of sale, while Lalubhái did not, appears to us, for the reasons we have given at such length, to have com-

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pleted his title, while his antagonist's remained imperfect. Both instruments were executed on the same day; and under different circumstances we might have to discuss whether the analogy of the Registration Acts, which admit fractions of days in determining the priorities of instruments according to the time of registration, applies in India to the execution of the instrument; but as it is we need not enter on that question.

We may add that as Lalubhái had paid by way of earnest only a sum less than one-fourth of the full purchase-money, and as land (as pressed on us for the appellant) is included amongst things vendible, and is, therefore, subject to the ordinary rules relating to vendible commodities, that rule applies to the present case which is stated by Narada (Jolly's Translation, p. 71):—"He who sells a commodity to one man and delivers it to another, shall pay double the price, and fine." Manu allows a rescission of a bargain within ten days, (see Coleb. Dig., b. III, ch. III, t. 23 and Comm.) and the texts of Yajn., *Ib.*, t. 32, 35, afford a basis for the passage of the Mitakshara quoted by the sastris in the Broach case at 1 Borr. 447, 2nd. ed. They state the rule thus:—"There is a rule that when ten days have expired ... the thing bought cannot be returned; but it relates to purchases paid for ..... It is declared in the Sastra with respect to earnest that, if refusal originates with the purchaser, he shall lose whatever he has advanced as earnest, and if with the seller, that he shall pay to the buyer double the value of what he has received as earnest." If this be taken as the law of Guzerat, Lalubhái's remedy is against Bái Amrit alone. The Smritis provide for an enforced delivery where the property remains in the possession of the vendor, but not where it has passed away from him to an honest purchaser. In such a case the remedy is a personal action for double the price or the earnest money.

It is not disputed, we believe, that an oral gift or sale of land, assented to by the donee or vendee, constitutes, according to Hindu law, a valid contract made effectual as a change of ownership by delivery of possession (see *per* Sir M. Westropp, C.J., in *Bálárám* v. *Appá*[1] and the authorities). The word "*agama*"

(1) 9 Bom. H. C. Rep. at p. 128.

(=title) on which the comments of the Mitakshara depend, and which is used by Manu (VIII, 200) as well as by Yajnavalkya (II, 27) does not necessarily mean a documentary title; indeed, Stenzler translates it "*erwerb*" (acquisition). It is on this term and the relation it expresses that, according to the Hindu law, the equal efficacy of the oral as of the documentary transaction would be placed, although, for the purposes of evidence, writings are superior to oral testimony (Narada—Jolly's Translation, pp. 23, 32), and for some purposes essential (Mitakshara in Macn. H. L. 198). But the contract, being in any way once established, is binding as between the parties. If, then, "*agama*," arising from an oral agreement, requires delivery of possession, or something equivalent, to complete it, or develope it into a real right of ownership in the vendee, so also must the "*agama*" arising from a written contract. In each case it is an act resulting in possession "that is effectual;" an act not accompanied by possession "is not deemed effectual." It appears to us, then, that, on the whole, a full investigation of the authorities, so far as they are accessible to us, tends to confirm the rule laid down by Sir T. Strange (H. L., vol. I, 31) half a century ago, "the rule requiring that there should be *juris et sesinæ conjunctio*;[1] ..... it being laid down that occupancy alone is not sufficient to constitute a right without a title, and that the production of a title will not suffice, unsupported by occupancy, a right resulting only from the union of both." We think, therefore, that the judgment appealed from was right, and we confirm the decree of the District Court with costs.

Decree affirmed.

[1] Combination of right and seisin.

[APPELLATE CIVIL.]

Before Mr. Justice Melvill and Mr. Justice Pinhey.

1877 August 21.

RAMCHANDRA SAKHARAM VAGH (ORIGINAL PLAINTIFF), APPELLANT *v.* SAKHARAM GOPAL VAGH (ORIGINAL DEFENDANT), RESPONDENT.*

Saranjám—Resumption—Pension, its impartibility—Hindu law—Adult son's right to demand maintenance from his father.

A *saranjám* is ordinarily impartible, and *semble* that a political pension granted in substitution of a resumed *saranjám* is so likewise. The Pensions Act (XXIII of 1871) prevents a civil Court from declaring such a pension to be partible, unless the Collector should authorize it to do so; and the fact that the Collector authorizes a suit for maintenance out of such a pension, affords no ground for presuming that he authorizes a suit for the partition of the pension.

If a Hindu father possesses practically no partible property, his legitimate son, though adult, and suffering from no disability to inherit, is entitled to maintenance from him.

Himmatsing v. *Ganpatsing* (12 Bom. H.C. Rep. 94) followed; but the correctness of the decision doubted by PINHEY, J.

THIS was a special appeal from the decision of W. H. Newnham, Judge of the district of Puna, confirming the decree of G. A. Mánkar, Joint Subordinate Judge of Puna.

In the year 1801 the Peishwá granted the village of Kohiáli, in the Junnar Taluká of the Puna district, as *saranjám* to one Gopál Ballál Vágh, who enjoyed it till his death in 1818, when the British Government resumed it, and granted instead a political pension of Rs. 1,200 *per annum* to his son Sakhárám during his life, and a moiety to the second generation.

The plaintiff Rámchandra, the son of Sakhárám by his first wife, alleged that his father married a second wife, and at her instigation turned him out of the house without giving him any education, or qualifying him for any calling or profession, and claimed Rs. 63 as arrears of maintenance for six months.

The defendant Sakhárám contended that his son, being adult, was not entitled to separate maintenance, according to Hindu law, and under Act XXIII of 1871 could claim no part of his pension.

The Subordinate Judge, in rejecting the claim, said: "If the allowance out of which a separate maintenance is claimed, is im-

* Special Appeal No. 185 of 1877.

partible, then such a suit as the present one will lie (*Himmatsing* v. *Ganpatsing*;[1] but if the allowance is partible, then the plaintiff is entitled to sue for a share, and, consequently, his suit for maintenance would be unsustainable. According to Hindu law only those male members of a Hindu family are entitled to maintenance who are labouring under any of the disabilities to inherit, such as illegitimacy, dumbness, blindness, madness, idiocy, leprosy, and other incurable diseases or infirmities (Sir T. Strange's Hindu Law, ch. IX). The plaintiff being subject to none of the disabilities to inherit, is entitled to sue for partition, if the pension is partible. I think the pension is partible."

Mr. Newnham upheld this decision. He said: No authority has been shown me for the claim of maintenance by an adult Hindu son, and in *Premchand Pepárá* v. *Hooláschand Pepárá*[2] it was held that there was no authority for such in the Hindu law. The allowance is one in which the son can claim a *share*, which he should have done."

Shámráv Vithal for the appellant:—Both the Courts are in error in holding that a pension granted in resumption of a *saranjám* was partible. In the case of *Moreshwar Dikshit* v. *Parshrám Dikshit*[3] Mr. Simson upheld the decree of the Agent for the Sirdárs in the Dekhan, which had declared *saranjáms* impartible. The fact that *saranjáms* were granted for the performance of military service, or of other State service, and can be resumed at the pleasure of the sovereign, shows that they cannot be partitioned: *Krishnaráv* v. *Rangráv*.[4] *Saranjáms* being impartible, and there being no other property from which the plaintiff can demand a share, his claim for maintenance should be allowed, as was done in the case of *Himmatsing* v. *Ganpatsing*.[5]

Bahiravnáth Mangesh for the respondent:—All property must be held to be partible, unless it be distinctly proved to be otherwise. No well-considered decision has been cited to show that *saranjáms* must not be taken to be partible like any other pro-

(1) 12 Bom. H. C. Rep. 94. (2) 12 Calc. W. R. 494 Civ. Rul.
(3) Appeal No. 2222 decided 16th June 1847.
(4) 4 Bom. H. C. Rep. 1 A. C. J. (5) 12 Bom. H. C. Rep. 94.

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perty. In *Rámchandra* v. *Parshram* (1) the appellant contended that the lower Court was in error in holding the village in dispute there to be liable to division, it being a *saranjám* village; but the objection was overruled, and the decree of the lower Court was affirmed. The case of *Himmatsing* v. *Ganpatsing* (2) is inequitable, and not consonant with the Hindu law. An aged father should not be compelled to maintain a grown-up son who has quarrelled, and who refuses to live with him. There is neither a legal nor a moral obligation upon him to do so. The proper thing for the plaintiff is to sue for partition. There is some evidence in the case that the defendant possesses other property, and the right to sue for maintenance is made to depend on some recognized disability to inherit; none such has been attempted to be shown in this case. The plaintiff's suit must, therefore, fail: *Premchand Pepárá* v. *Hoolaschánd Pepárá*.(3)

MELVILL, J.:—It appears from exhibit No. 22 that a *saranjám* was granted by the Peishwá to the defendant's father in 1801. It was resumed by the British Government in 1818, and, in lieu of it, a pension of Rs. 1,200 was granted to the defendant, half of which was to be continued to the second generation.

The plaintiff is an adult legitimate son of the defendant, and it is found by the Courts below that he has been turned out of his father's house in consequence of family quarrels arising out of his father's second marriage. He now sues the defendant for Rs. 63, being the amount of necessary expenses incurred by him during the six months preceding the suit. He has received a certificate from the Collector, under section 6 of Act XXIII of 1871, authorizing the civil Courts to entertain the suit. The parties are Brahmins, and the plaintiff alleges in his plaint, and the allegation is not contested in the defendant's written statement, that his father has not given him any education, or qualified him for any profession or calling.

(1) Sp. Ap. No. 157 of 1875 decided on 1st March 1877 by Westropp, C.J., and Melvill, J., not reported.

(2) 12 Bom. H. C. Rep. 94. (3) 12 Calc. W. R. 494 Civ. Rul.

The Courts below have disallowed the claim, on the ground that a Hindu son cannot sue his father for maintenance, if there is any property in which he is entitled to a share. Both Courts held that the defendant's pension is liable to partition, and they referred to the statement of one of the plaintiff's witnesses (No. 19), as indicating that there was other immoveable property belonging to the family. Under these circumstances they considered that the plaintiff's proper course was to sue for a partition.

There is nothing in the pleadings or issues as to the existence of any immoveable family property. Witness No. 19 makes a vague statement that the defendant receives the produce of some fields; but he does not say that the fields are ancestral property, and, as such, liable to partition. Exhibit 22 shows that, at the time when it was prepared, the defendant's income, from sources other than his pension, was only Rs. 40 per annum. Assuming this income to be still in existence, and to be derived from family property, the plaintiff's share in it would be Rs. 10 a year. Such an income would, of course, be quite insufficient for his maintenance, and if there is no other property liable to division, it would be a mere mockery to refer the plaintiff to a partition suit. For all practical purposes it must be considered that there is no family property, except the pension, to which the plaintiff can look for his maintenance.

I am unable to concur in the opinion of the Courts below that the pension is partible. A *saranjám* is ordinarily impartible, and a pension granted in lieu of *saranjám* would, I think, be equally impartible. At all events, the provisions of the Pensions Act would prevent a civil Court from declaring such a pension to be partible, unless the Collector should authorize it to do so. And the fact that the Collector has permitted the plaintiff to sue for maintenance out of the pension, does not by any means indicate that he would permit the pensioner's sons to demand a partition of the allowance in equal shares.

What we have to determine, then, is whether, in a case in which there is practically no family property to be divided, an adult Hindu is entitled to maintenance from his father, who is in the

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enjoyment of a pension granted by Government in lieu of a resumed *saranjám*. I am of opinion that he is. As a general rule, perhaps, a Hindu is not bound to support a grown-up son: *Premchand Pepárá* v. *Hoolaschand Pepárá*.(1) But in *Himmatsing* v. *Ganpatsing*(2) it was held that when the family estate is impartible, and one to which the law of primogeniture applies, a son can sue his father for maintenance. It appears to me that that decision governs the present case. The orders of Government in regard to *saranjám* are that the *saranjám* shall not be subdivided, but that the obligations of the holder to maintain the younger members of his family shall be strictly enforced. (See Nairne's Revenue Hand-book, page 346, paras. 13 and 14.) A pension, not forming a new grant, but given in substitution for a resumed *saranjám*, ought in equity to involve the same obligation on the holder, and the same benefits to the younger members of his family. I, therefore, think that the plaintiff is entitled to receive a moderate maintenance out of the pension: and as the amount claimed by him is undoubtedly moderate, I would reverse the decrees of the Courts below, and allow the claim, with costs on defendant throughout.

PINHEY, J.:—I concur in the judgment just delivered by my brother Melvill; but I have arrived at this conclusion after entertaining very considerable doubt on the point of law on which the decision of the case depends. I have no doubt whatever that the political pension which was granted to the defendant Sakhárám Gopál Vágh as commutation, on the resumption of the *saranjám* held by his father, is impartible, and protected from the process of the civil Court by section 11 of the Pensions Act (XXIII of 1871). I have, however, felt great doubts whether it is good (Hindu) law to say that an adult son in an undivided Hindu family, who is suffering from no disability recognized by that law, can claim a separate maintenance from his father. In *Premchand Pepárá* v. *Hooláschand Pepárá*,(3) Mitter, J., in delivering the judgment of the Court, said:—"We find no authority in the Hindu law to support the position that a father is obliged to support a grown-

(1) 12 Calc. W. R. 494 Civ. Rul. (2) 12 Bom. H. C. Rep. 94.
(3) 12 Calc. W. R. 494 Civ. Rul.

up son." I confess that I incline to the same opinion. By Hindu law the obligations of a father and of a son are not reciprocal: *e.g.*, a son under Hindu law is liable for his father's debts, but a father is not liable for his son's debts. Moreover, it seems to me a strange proposition to say that a father is liable to maintain his grown-up son, however worthless, notwithstanding that the son does not choose to take any trouble to maintain himself. Although, however, I have looked through many books on Hindu law and have referred to the reported decisions of the Indian High Courts, I have been unable to find any authority to support the opinion to which I incline, except the decision of the Calcutta High Court which I have already cited. The point was not argued before us in this case. The defendant's pleader argued before us that the defendant's pension was partible, and, therefore, plaintiff should sue for his share of the family property. The plaintiff's pleader, on the other hand, argued that the pension was impartible, that there was no other family property, and that, therefore, plaintiff was entitled to sue for maintenance. Holding (as both my brother Melvill and I do hold) that defendant's pension is impartible, the contention of the plaintiff's pleader is supported by the decision of this High Court in *Himmatsing* v. *Ganpatsing*,[1] and I feel bound to follow that decision—supported, as it is, by the *dicta* in Strange's Hindu Law, p. 353, para. 23 (ed. of 1864) and Steele's Law and Customs of Hindu Castes, p. 40, para. 30, last line (ed. of 1868). At the same time I think it not at all improbable, that in some future case, when the point is further considered and exhaustively argued, viz., whether in a united Hindu family an adult son, who is suffering from no disability, can sue his father for a separate maintenance, the authority of *Himmatsing* v. *Ganpatsing* will be shaken. And I should certainly be glad to see that case overruled, for the rule which it lays down appears to me subversive of Hindu society and very injurious. I can conceive nothing more fatal to the happiness of Hindu family life than for this Court to affirm the principle that a Hindu father is liable to have to provide for each of his sons a separate maintenance, while the son may choose to live a life of idleness, and probably in consequence, in a licentious city like

(1) 12 Bom. H. Rep. 94.

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Puna, a life of vice. I am quite unable to agree with the District Judge, who tried this case on appeal, in considering the plaintiff entitled to either pity or sympathy. The plaintiff is between thirty and forty years of age, and I think if he had any manliness of character or generosity of spirit he would rather have earned an honest livelihood by breaking stones on the road than have claimed a separate maintenance from his old father, who would appear from exhibit 22 to be at least seventy years of age, to have two other sons, and probably the other innumerable dependents who usually hang round the head of a once wealthy Marathi family.

Taking, however, the case of *Himmatsing* v. *Ganpatsing* as enunciating the law which should govern this case, I agree with my brother Melvill that the plaintiff is entitled to recover the amount which he claims. That amount is undoubtedly moderate, if plaintiff is under no obligation to try and make something by his own exertions. It is true that both the Courts below appeared to think that, besides the impartible pension, the defendant is possessed of some property of which plaintiff can claim partition: but the evidence in the case, from which the lower Courts can have arrived at this opinion, does not show that defendant has more than a very small income besides his political pension. Plaintiff's share of this residue would be quite insufficient to afford him a maintenance, and the decision in *Himmatsing* v. *Ganpatsing* would have no meaning if we were to hold that it did not apply in a case in which a son claiming maintenance could by suing for his share of the partible property, obtain a rupee or ten rupees by the partition of such portion of the family estate.

I agree, therefore, to reverse the decrees of the Court below and to award this claim. In doing so, however, I do not see that we give the plaintiff much more than a piece of paper with the Court's seal on it; for one of the grounds on which I base my judgment is that the family property of the parties, independent of the political pension, is (if it exists at all at present) infinitesimally small, and other members of the family have interests in it, whilst against the pension the plaintiff will be prevented from executing his decree by the provisions of the Pensions Act of 1871.

Decrees reversed.

[APPELLATE CIVIL.]

Before Sir M. R. Westropp, Kt., Chief Justice, and Mr. Justice Melvill.

NÁNÁ BIN LAKSHMAN AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS *v.* ANANT BÁBÁJI (ORIGINAL PLAINTIFF), RESPONDENT.* 1877 September 19.

Optional registration—Act XVI of 1864, *Section* 13—*Act XX of* 1866, *Section* 17—*Act VIII of* 1871, *Section* 17—*Determination of value—Consideration.*

The value of the right, title, or interest created by a mortgage is estimated by the amount of the principal money thereby secured.

The words "or in future" in section 17 of Act XX of 1866 and section 17 of Act VIII of 1871 have reference to estates in remainder or in reversion in immoveable property, or to estates otherwise deferred in enjoyment, and not to interest payable in future on principal moneys lent on the security of immoveable property.

Darshan Singh v. *Hanwantá* (I. L. R. 1 All. 274) dissented from.

PLAINTIFF sued on a mortgage deed, dated the 1st November 1867. The mortgage was for a sum of Rs. 95, with interest at Rs. 1-9 per cent. per mensem—*i.e.*, upwards of 18 per cent. per annum—and not redeemable for five years from the date of its execution. Defendants contended that the right, title, or interest created by the mortgage exceeded Rs. 100 in value, and, therefore, according to Act XX of 1866, section 17, clause 2, the document required registration, and not having been registered, could not lawfully be received in evidence, or acted on by any Court, under section 49 of that Act.

The Subordinate Judge of Khed held that the defendants were right in their contention; but this decree was reversed on appeal by W. H. Newnham, Acting District Judge of Puna. The defendants thereupon preferred this special appeal to the High Court.

Shántárám Náráyan for the appellants.

There was no appearance on behalf of the respondent.

WESTROPP, C.J.:—On behalf of the defendants it is contended that as the mortgage (exhibit 3) of the 1st November 1867 was for a sum of Rs. 95, with interest at Rs. 1-9 per cent. per mensem—*i.e.*, upwards of 18 per cent. per annum—and was not redeemable for five years from its date, the right, title, and

* Special Appeal No. 207 of 1877.

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interest thereby created exceeded Rs. 100 in value, and, therefore, according to Act XX of 1866, section 17, clause 2, required registration, not having been registered, could not lawfully be received in evidence, or acted on by the lower Court (section 49). In support of this contention, *Darshan Singh* v. *Hanwantá*[1] was cited. The Court, in its judgment in that case, stated that the instrument, the necessity for registration of which was there in question, "secured the repayment of Rs. 99 plus Rs. 6, the interest for three months." Hence we infer that the whole consideration, shown by the instrument to have been received by the mortgagor, was Rs. 99. The statement of facts made by the reporter, though not quite so clear on that point as might be, leads us to the same conclusion. If we be right in inferring that the mortgagor did not receive any larger consideration than Rs. 99, we are unable to concur in the decision of the High Court at Allahabad, that, assuming the instrument to charge the mortgagor's immoveable property, registration was compulsory. That decision was rested on the ground that Rs. 99 plus Rs. 6, the interest for three months, "was the least sum that could have been recovered under the instrument." The registration value was there gauged, not by what the mortgagor received from the mortgagee, as consideration for granting the alleged mortgage, but by what the Court regarded as the minimum sum which the mortgagee could have recovered under it. In this Court, however, in considering whether a mortgage is of the value of Rs. 100 or upwards, the value of "the right, title, or interest" created by the mortgage has always been estimated by the amount of the principal money thereby secured: that being assumed to be the sum received by the mortgagor as consideration for making the grant by way of mortgage, or, so to speak, the purchase money of the mortgage. When it is necessary to determine whether an instrument, other than a deed of gift, purports or operates to create, &c., any right, title, or interest, of the value of Rs. 100 or upwards, to or in immoveable property, the test of value which we adopt is the consideration stated in the instrument, whether it be one of sale or of mortgage, to be given to the grantor, and not either the minimum, or maximum, or

(1) I. L. R. 1 All. 274.

other benefit which may result from the transaction to the grantee, whether he be vendee or mortgagee. There are reported cases in which the High Court of Calcutta (*Rohinee Debia* v. *Shib Chunder Chatterjee*[1] and this Court (*Vásudev Moreshvar* v. *Rámá Bábáji*,[2] *Sátrá Kámáji* v. *Vishrám*[3]) have ruled that the purchase-money mentioned in a deed of sale must be regarded as showing the value of the interest conveyed, for the purpose of determining whether or not the registration is compulsory. The circumstance that there is nothing in the terms of the Registration Acts to impose upon the Courts the duty of instituting any inquiry, as to the actual value of an interest in immoveable property affected by an unregistered instrument, previously to the admission of that instrument in evidence, and the many and great inconveniences and difficulties which would attend upon such an inquiry, are clearly pointed out in the judgments of Ainslie and Loch, JJ., in the first mentioned of those cases. There is nought in those Acts to suggest that there should be one mode of ascertaining the value in the case of deeds of sale, and another for testing the value in the case of a deed of mortgage, or of rent charge, or of annuity, or creating or conveying any other minor interest in, or charge or incumbrance upon, immoveable property. We do not know any good reason for making such a distinction, and can perceive many for refraining from its introduction. If the necessity for registration of a mortgage is to be ascertained, not by the consideration given by the mortgagee for it, but by the actual value of the transaction to the mortgagee, the test would, at the time of making the contract and when the parties would most need to know whether the mortgage must be registered, be wholly impracticable if the interest, or profits in lieu of interest, receivable by the mortgagee is to form one of the elements of value. The rate of interest might, of course, and usually would be then fixed, but the amount of it could only be known when the mortgage was redeemed or foreclosed. The time of redemption for foreclosure would depend on the pleasure or convenience of the parties or of one of them. Why should the first three or six months' interest, merely because it is specially

(1) 15 Calc. W. R. 558 Civ. Rul.
(2) 11 Bom. H. Rep. 149. (3) I. L. R. 2. Bom. 97.

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noticed in the mortgage, be taken into account more than any subsequent interest receivable by the mortgagee? If the mortgagee be not entitled to interest under the mortgage, and the stipulation be that, in lieu thereof, he is to enter into occupation of the land and to cultivate it, and retain the profits arising from the cultivation, how, at the date of the contract, could the actual value of the mortgage to the mortgagee be ascertained? These are amongst the grounds upon which rests the practice, which has uniformly prevailed here, of estimating the value of a mortgage as well under Act XVI of 1864, Act XX of 1866, and Act VIII of 1871 by the amount of the principal money lent, and without any regard to the duration of the relation of mortgagor and mortgagee, or to the rate or continuance of the interest payable. Had we put a different construction on section 13 of Act XVI of 1864, section 17 of Act XX of 1866, or section 17 of Act VIII of 1871, we should, we think, have converted those enactments into so many traps for the unwary, which could not have been the intention of the Indian Legislature. The words "or in future," which occur in the two last-mentioned enactments, have reference, as we think, to estates in remainder or in reversion in immoveable property, or to estates otherwise deferred in enjoyment, and not to interest payable in future on principal moneys lent on the security of immoveable property. For these reasons we must affirm the decree of the District Judge.

Decree affirmed.

[APPELLATE CIVIL.]

Before Sir M. R. Westropp, Kt., Chief Justice, and Mr. Justice Melvill.

October 2.

DULSOOC RATTANCHAND (PLAINTIFF) *v.* CHUGON NARRUN AND ANOTHER (DEFENDANTS).*

Limitation Act IX of 1871, *Schedule II, Articles* 75 *and* 167—*Decrees payable by instalment—Limitation Act XV of* 1877, *Schedule II, Article* 179, *Clause* 6.

A decree payable by instalments, with a proviso that in default of payment of any one instalment the whole amount of the decree shall become payable at once, is barred, if application for execution be not made within three years from the date on which any one instalment fell due and was not paid.

* Small Cause Court Reference No. 101 of 1877.

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The payment of instalments subsequent to default in payment of the first instalment at the date specified, does not give the judgment-creditor a fresh starting point.

THIS case was referred for the opinion of the High Court by Cursetji Manekji, Judge of the Court of Small Causes at Ahmedabad, with the following observations:—

"In the above suit a decree was made in favor of the plaintiff, on the 14th June 1873, for Rs. 123, including costs, and payable by yearly instalments of Rs. 20-8, with a proviso that in case default were made in the payment of any one instalment then the whole amount of the decree should become payable at once.

"The first instalment fell due on the 14th June 1874, but default was made in payment of the same. The second instalment was, however, paid into Court on the 2nd April 1875, and the third instalment on 13th March 1876. Plaintiff has now applied for cution of the whole decree. His application is dated 23rd ıe 1877, and the question is—whether this application is not red?

My opinion is, that it is barred, as not having been made within ɔ years from the 14th June 1874. On that date the first ment fell due, and default being made in payment of the same, the entire liability under the decree, by its express terms, became enforceable on that day. The decree became as one no longer payable by instalments. That was the intended effect of the proviso as to default, and the 14th June 1874 must thus be deemed to be the date within three years of which the judgment-creditor was clearly bound to have applied for execution. The time began to run against him from the above date; and his present application, not made till the 23rd June 1877, must be held as barred. (See *Tiluck Chunder Gooho* v. *Gour Monee Debee*.[1])

"The head-note of the case, just quoted, does not correctly state the point decided. The decree there (as in this case) was made payable by instalments, with the usual proviso as to default. The Judges decided that the right to recover on the whole decree accrued to the judgment-creditor on the day that the instalment became due and default was made in payment of the same. The

(1) 6 Calc. W. R. 92 Misc. Rul.

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Judges appear to have gone further, and to have decided, that, even if there had been no condition in the decree that execution might issue for the whole sum on failure to pay any one instalment, the latter instalments that were within time, could not have been realized. This case has been dissented from by Tucker and Gibbs, JJ., in *Utámrám Mánikrám* v. *Girdharlál Motirám*;(1) but I respectfully submit that it is the latter portion of that judgment that has been dissented from and not the former.

"The provisions of section 23, Indian Limitation Act, 1871, apply to decrees such as the one in question here. (See *Rughoonáth Doss Cookman* v. *Ránee Shiromonee.*(2))

"The payment of the subsequent instalment, I submit, does not operate to take the case out of the provisions of article 167, schedule II, Act IX of 1871. Part payment on account of a decree does not give it any fresh starting point, unless the same has been recovered by some process of execution. The Limitation Act of 1871 is silent on the point. Section 21 of the same clearly does not apply to decrees. Article 167, whilst it provides a fresh starting point in certain cases, does not provide for the case of part payments made either through the Court or otherwise, and the rule *expressio unius exclusio alterius* would accordingly apply. The new Limitation Act (XV of 1877), which comes into force from the 1st October next, makes no difference on this point.

"The judgment-creditor's vakil contends that the proviso as to default was conceded in favour of his client, and that he was at liberty to waive the benefit of it. I am unable to concur in this view, and have not been able to find any authority in support of it. Though this may be so in case of contract, the case of a decree is not analogous. I would submit that a decree once made, leaves the judgment-creditor applying for execution, no option to extend its terms, or to consent to take satisfaction otherwise than as provided therein. (See judgment of Peacock, C.J., in *Kristo Komul Singh* v. *Huree Sirdár.*(3))

(1) 6 Bom. H. C. Rep. 45 A. C. J. (2) 24 Calc. W. R. 20 Civ. Rul.
(3) 13 Calc. W. R. 44 F. B.

"For these reasons I have rejected the application as barred; but as the question is a novel one and of frequent occurrence, I think it desirable to refer the same for the opinion of the Honorable the High Court."

No counsel or pleader appeared on either side.

WESTROPP, C.J. :—A decree of the 14th June 1873 for Rs. 123 was made payable by annual instalments of Rs. 20-8, with a proviso that, on default of payment of any one instalment, the whole amount of the decree should become payable forthwith. The first instalment fell due, but was not paid until subsequently to the 14th June 1874. The second instalment was paid into Court on the 2nd April 1875, and the third instalment on the 13th March 1876. The plaintiff on the 23rd June 1877 applied for execution for the whole of the residue of the amount decreed. The Judge of the Court of Small Causes at Ahmedabad has referred to this Court the question whether the right to such execution is barred by the law of limitation (Act IX of 1871), and has expressed his own opinion to be in the affirmative. In that opinion we concur. We think that the whole amount decreed became due on the first default in payment of the instalments, viz., on the 14th June 1874, so that three years and nine days had elapsed when the plaintiff made his present application for execution. The Full Bench case of *Gumná Dambershet* v. *Bhiku Haribá*[1] was decided upon the Limitation Act XIV of 1859. The principles, however, on which that case was decided apply in this case. There is not in the last clause of article 167 of schedule II of Act IX of 1871, which clause relates to decrees payable by instalments, any provision similar to that in article 75 of the same schedule with respect to promissory notes or bonds payable by instalments; where such notes or bonds provide that, if default be made in payment of one instalment, the whole shall be due, fixing that the period of limitation shall begin to run from the time of the first default, unless where the obligee waives the benefit of the provision, and then when fresh default is made. Nor does there appear to be in the new Limitation Act XV of 1877, schedule II, article 179, clause 6, relating to decrees payable by instalments, any such provision.

(1) I. L. R. 1 Bom. 125.

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DULSOOK RATTAN-CHAND v. CHUGON NARRUN.

The first question of the learned Judge—viz. whether a decree, payable by instalments with proviso as aforesaid, is barred, if application for execution of the same be not made within three years from the date on which any one instalment fell due and was not paid—must be answered in the affirmative; and his second question as to whether the payment of instalments subsequent to default in payment of the first instalment at the date specified, gives to the judgment-creditor a fresh starting point, must be answered in the negative.

Order affirmed.

[APPELLATE CIVIL.]

Before Sir M. R. Westropp, Kt., Chief Justice, and Mr. Justice Melvill.

November 21.

KABIR VALAD RAMJAN (ORIGINAL PLAINTIFF), APPELLANT *v.* MAHADU VALAD SHIWAJI, A MINOR, BY HIS ADMINISTRATOR PURSHOTUM NARAYEN (ORIGINAL DEFENDANT), RESPONDENT.*

Suit to recover costs of proceedings under Act XX of 1864.

An action brought to recover costs of proceedings held under Act XX of 1864 is not maintainable when the Court, before which such proceedings were taken, has made no order as to the payment of such costs.

THE following question was submitted for the opinion of the High Court, by Prabhákar Vithal Gupté, Second Class Subordinate Judge at Jalgaon, in the district of Khandesh, under the provision of section 22 of Act XI of 1865 :—

"Whether, or not, an action for the recovery of costs incurred in obtaining a certificate of administration to the estate of a minor, under Act XX of 1864, is maintainable, when the Court granting the certificate has passed no order as to the payment of such costs.

"It appeared that the plaintiff, in 1873, brought a suit against the minor defendant on a bond which had been executed to him (plaintiff) by deceased Rámji; and that there being then no administrator to the minor's estate, which was worth more than Rs. 250, the plaintiff, in order that he might proceed with the suit, applied to the District Judge at Dhulia to appoint an admi-

* Small Cause Court Reference No. 100 of 1877.

nistrator to his (the minor's) estate under Act XX of 1864. The District Judge accordingly granted a certificate to the Názir of this Court, but passed no order as to the payment of costs incurred by the plaintiff in obtaining the said certificate. The plaintiff, therefore, brought this present suit for the recovery of those costs.

"The defendant answered that the suit was not maintainable under Act XX of 1864, and that he did not know what costs had been incurred by the plaintiff in obtaining the certificate.

"Section 13 of Act XX of 1864 provides that, 'in all inquiries and other proceedings held or had by the civil Court under this Act, the Court *may* make such order as to the payment of costs by the person on whose application such inquiry was made, or proceedings had, or out of the estate of the minor, or otherwise, as it may think proper.' Under this section it is, I think, discretionary with the Court, therein mentioned, to award, or not to award, costs incurred in inquiries and proceedings under the above-mentioned Act. In the present case the District Judge's order (copy of which is hereto annexed) granting the certificate is silent as to the payment of costs. To hold, therefore, that this action is maintainable, would be to allow the plaintiff to recover what the District Judge, in the exercise of his discretion, under the said section, has not thought fit to award him (the plaintiff).

"In *Jalam Punja* v. *Khoda Javra*[1] it has been held that no action lies for the recovery of costs incurred in a possessory suit under Bombay Act V of 1864.[2] This Act was silent as to the award of costs between party and party. In inquiries under Act XX of 1864, however, the Legislature has, by section 13, left the award of costs to the discretion of the Court making such inquiries, and if in the exercise of that discretion the said Court has not thought it proper to award costs, it would, I submit, be an additional reason why the present suit should not be entertained.

"I am, therefore, of opinion that this suit is not maintainable But, as I entertain some doubts on this question, I respectfully beg to submit it for the opinion of the High Court.

(1) 8 Bom. H. C. Rep. 29 A.C.J.

(2) Now repealed by Act III of 1876 (Bombay).

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"Upon the evidence adduced before me in this case I have found that the amount of costs claimed in this suit is reasonable and proper. But, as I am of opinion that this action is not maintainable, I have thrown out the plaintiff's claim with costs, subject, of course, to the opinion of the High Court on the question referred."

PER CURIAM:—The Court concurs in the opinion of the Second Class Subordinate Judge of Jalgaon, that the action brought to recover costs of the proceedings, under Act XX of 1864, will not lie, and was rightly dismissed with costs.

Decree affirmed.

[APPELLATE CIVIL.]

Before Sir M. R. Westropp, Kt., Chief Justice, and Mr. Justice Melvill.

November 20.

RAMCHANDRA CHINTAMAN (ORIGINAL PLAINTIFF), APPELLANT *v.* KALU RAJU AND ANOTHER (ORIGINAL DEFENDANT), RESPONDENTS.*

Vakil and client—Vakalatnama—Agreement without consideration—Nudum pactum—Inam chithi.

An agreement, executed by a client to his vakil, after the latter had accepted a *vakalatnama* to act for the former in a certain suit, whereby the client bound himself to pay to the vakil, in the event of his conducting the suit to a successful termination, a certain sum in addition to the vakil's full fees *held nudum pactum*, and a suit founded upon it dismissed as unsustainable.

ON the 19th August 1875, the plaintiff accepted a *vakalatnama* from the defendant to act for him in a certain suit. On the 11th August issues were settled, and witnesses examined, and the suit was then adjourned to the 16th October following. On that day the defendant executed in favour of the plaintiff an agreement, called therein an "*inam chithi*," whereby the defendant agreed to pay to his vakil, the plaintiff, a certain sum "as *inam*," if the suit was decided in defendant's favour, and the plaintiff's claim therein was rejected, or "if it were amicably settled, or a *razinama* given," and, in default of punctual payment of the "*inam*," the defendant agreed to pay interest thereon. The agreement stated that, besides the amount of the "inam," certain earnest money and

* Civil Reference No. 18 of 1877.

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the amount of the vakil's full fee had been debited by the plaintiff to the defendant at the latter's direction. The suit was decided in favour of the defendant, who, however, did not pay the amount of the "inam" to the plaintiff. The plaintiff, therefore, brought the present suit upon the agreement.

The Subordinate Judge of Shirpur, in whose Court the suit was filed, rejected the plaintiff's claim, on the ground that the contract was void under the Indian Contract Act No. IX of 1872, holding that such an agreement could not be made between the pleader and his client *pendente lite*. In appeal, Mr. Cordeaux, Acting Judge of the district of Khandesh, forwarded the case for the opinion of the High Court, under section 28 of Act XXIII of 1861, with the following remarks:—

"The question which I would submit is, whether a private agreement, settling the remuneration to be paid for a pleader's professional services, is void by reason of its being executed on a date subsequent to that on which the *vakalatnama* has been filed in a suit, and before decision has been passed therein?

"My opinion is, that such an agreement, if it is purely a promise to pay certain remuneration for professional services, is not invalid: and that the burden of proving the good faith of the transaction is on the pleader only when the good faith is impeached by the client (see section 111 of the Evidence Act). At the same time it appears to me doubtful whether an agreement, such as that which was executed by the defendants in favour of their pleader, is not contrary to public policy, and, therefore, void on that ground. In *Rao Sáheb V. N. Mandlik* v. *Kamaljábái*[1] there was an exactly similar agreement, and it was argued by the learned counsel (Anstey and Latham) that to enforce an agreement of this kind would be a dangerous precedent to establish for vakils practising in the mofussal. Whilst, on the other side, it was contended that such agreements were frequent between parties and their pleaders, and were not opposed to section 7 of Act I of 1846. No opinion was expressed by the Court, the case being

(1) 10 Bom. H. C. Rep. 26.

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decided on other grounds; and I have been unable to find any decision on the subject to guide me.

"It appears to me that an agreement—in which there is a promise to pay a pleader a certain sum, if, in consequence of his professional services, the client wins the suit, as remuneration for his services—cannot be held to be invalid, unless there has been misreprseentation or fraud, and the client finds himself called on to pay a sum utterly inadequate to the services performed.

"Here, too, the law will not presume fraud, and the burden of proof of the good faith of the transaction is not on the pleader till the good faith of the transaction is impeached by the client."

WESTROPP, C.J., after stating the facts, continued:—We are of opinion that the agreement was executed without consideration, and thus being a "*nudum pactum*," the suit founded upon it is unsustainable. The plaintiff, having accepted a *vakalatnama* from the defendants upwards of two months previously to the execution of the agreement, was already bound to render his best services as a pleader to them in suit No. 723 of 1875, and had, as appears from the agreement itself, accepted that *vakalatnama* upon the terms of receiving his usual fee as a pleader. It must not, however, be supposed that we regard the appearance of that circumstance on the face of the agreement as a matter of importance. It is one which, in the absence of any express stipulation to the contrary, the law would imply when a pleader is retained by a party to a suit. There was no fresh consideration proceeding from the plaintiff when he obtained the agreement of the 16th October. He could not be more firmly bound by it to render to the defendants his professional services than he already was by the acceptance of the *vakalatnama*. It may be noted, too, that the agreement, appropriately enough, describes itself as an *inam chithi*. Not, indeed, that this is of any importance, inasmuch as, even if this were not so, it would be sufficiently manifest that the promise to pay the sum of Rs. 61, in addition to the ordinary fee and earnest money mentioned in the agreement, was utterly without consideration. The District Judge should be informed that the plaintiff's suit should be dismissed with costs.

[APPELLATE CIVIL.]

Before Sir M. R. Westropp, Kt., Chief Justice, and Mr. Justice Melvill

NATHU GANESH (PLAINTIFF) *v.* KALIDAS UMED (DEFENDANT).* 1877 November 27.

Suit by plaintiff as owner to recover moveable property under Rs. 500—Jurisdiction—Court of Small Causes—Act X of 1877.

The plaintiff was owner of moveable property attached in execution of a decree, and his claim to such property having been rejected under section 246 of Act VIII of 1859, he brought this suit to recover possession. *Held* that the suit was cognizable by a Mofussal Court of Small Causes.

Quære—Whether the new Civil Procedure Code (Act X of 1877) allows such a suit, by an alleged owner, to be brought in a Court of Small Causes.

THIS case was submitted for the opinion of the High Court by Cursetji Manekji, Judge of the Small Cause Court at Ahmedabad, with the following remarks:—

"In this suit the plaintiff sues to recover possession of certain property, or the price of the same. The said property was attached in execution of a decree of this Court, obtained by the defendant against one Vanarsi Rungji and others. The plaintiff had applied, under section 246 of the Civil Procedure Code (VIII of 1859), for the release of his said property, but was unsuccessful. Under the provisions of the latter part of the said section 246, the plaintiff now brings his suit to recover the property. The defendant takes a preliminary objection that such a suit cannot be entertained by this Court.

"The question, therefore, is—has this Court jurisdiction to entertain this suit? I am of opinion that it has.

"This is a suit which comes well within the provisions of section 6, Act XI of 1865, which distinctly gives jurisdiction over suits for 'personal property or for the value of such property.'

"The defendant's vakil has cited a case (which was referred by this Court and is reported in 6 Bombay High Court Reports, 27 A.C.J.) as being in support of his contention. But, I submit, that the case does not apply, as it can very well be distinguished from

* Small Cause Court Reference No. 115 of 1877.

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the case now under consideration. That was a case in which it was the decree-holder, who being unsuccessful under section 246, sued to establish, *not his own* right to the property attached, but the right of his judgment-debtor.

"The difference that exists between the suits that may be brought under the provisions of the latter part of section 246 is plain and obvious. Either the defeated decree-holder may sue to establish his judgment-debtor's right to the property released from attachment, or the unsuccessful claimant under section 246 may seek to recover his own property or its value. The relief sought in each of these suits is very different. In the first the relief sought is the declaration of the title to the property of some person other than the plaintiff. In the second it is the declaration of plaintiff's own title. The distinction between the two is clear and legitimate. In the one case this Court would have no jurisdiction; in the other, I submit, it has, provided the property is personal, and its value less than Rs. 500.

"In the case above cited the Judge, Mr. Gapálráv, appeared to think that certain decisions of the Calcutta High Court on the point were in conflict. But I think, with due deference, that this is not really the case. The learned Judge appeared not to have taken into account the plain and broad distinction existing between the two classes of cases, as pointed out in the preceding paragraph.

"In *Woomesh Chunder Bose* v. *Muddun Mohan Sircár*[1] the plaintiff sued to recover certain bricks, his own property, after his claim to the same under section 246 had been rejected. The property being moveable, and in value less than Rs. 500, it was held that he was bound to bring his suit in the Small Cause Court. The subsequent decisions of the Calcutta High Court do not, I submit, conflict with or overrule this decision. This case, which may be called the 'brick case,' is precisely on all fours with the case which is the subject of this reference.

"In *Rám Gopál* v. *Rám Gopál*[2] the plaintiff was the unsuccessful decree-holder, seeking to establish a lien on certain buffaloes which

(1) 2 Calc. W. R. 44 Civ. Rul. (2) 9 Calc. W. R. 136 Civ. Rul.

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had been attached under a decree of his, but released under section 246. In *Rám Dhun* v. *Kefal Biswas* (1) it was again the decree-holder seeking to establish his *judgment-debtor's* right to property seized in execution and released under section 246. It is quite clear that both these suits, as well as the suit in which reference was made by this Court (6 Bom. H. C. Rep. 27 A.C.J.), were suits that did not come within the purview of section 6 of Act XI of 1865; and differing, as these do, materially from the class of cases, such as the one under consideration and the 'brick case,' the decisions cited in this para. cannot, I submit, be held to govern the latter class of cases.

"There is, however, another case, *Moozdeen Gázee* v. *Dinobundhoo Gossámee* (2) which apparently conflicts with the 'brick case' (cited above). This was a suit precisely of the same sort as the one now before me, brought by the unsuccessful claimant for the recovery of personal property belonging to himself. The Small Cause Court Judge at Jessore referred the case for the opinion of the Calcutta High Court, because he considered that the case of *Rám Dhun* v. *Kefal Biswas* (3) was opposed to the 'brick case.' The Honourable the High Court will observe that the Jessore Judge was clearly under a misapprehension as to the nature of the two cases, and that the decision of the Calcutta High Court, which followed on this reference, is unsatisfactory for the same reason. Mr. Justice Jackson in his judgment says that the case of *Rám Dhun* v. *Kefal Biswas* was 'precisely on all fours' with the case referred by the Jessore Judge. Here, as their Lordships will observe, the Judges of the Calcutta High Court lost sight of the distinction between the two classes of cases, which arise under section 246, and therefore their decision is open to objection.

"The decision of Scotland, C.J., and Innes, J., in *Janakiámmal* v. *Vithenádien* (4) supports the view taken in the 'brick case.' In this case the plaintiff, wife of a judgment-debtor, having been unsuccessful under section 246, sued to recover the property which had been attached in execution of a decree against her husband. The Madras Judges held that the Small Cause Court had jurisdic-

(1) 10 Calc. W. R. 141 Civ. Rul.
(2) 13 Calc. W. R. 99 Civ. Rul.
(3) 10 Calc. W. R. 141 Civ. Rul.
(4) 5 Mad. H. C. Rep. 191.

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tion. This case was followed in *Kundeme Naine* v. *Rávoo Latchmipati*.[1]

"A recent decision, not reported, of the Honourable the High Court of Bombay is also in support of the same view. A gold necklace was attached under a decree of this Court. One Kesowlál came in as claimant under section 246, but was unsuccessful. He then filed his suit in the Court of the Subordinate Judge of Ahmedabad for the recovery of the necklace, and obtained a decree. On appeal to the Assistant Judge, the said decree was reversed. Kesowlál preferred a special appeal to the High Court. The High Court dismissed the special appeal on the ground that the suit was in the nature of a Small Cause Court suit, and the special appeal did not lie. On review this order was confirmed by JJ. Melvill and Pinhey (special appeal No. 291 of 1876. Dismissed 11th August 1876. Final order 14th December 1876.)

"As the question is of considerable importance, and as an express decision of the Honourable the High Court of Bombay on the point is desirable, I make this reference."

No counsel or pleader appeared on either side.

WESTROPP, C.J. :—The plaintiff sued in the Ahmedabad Court of Small Causes, as alleged owner of certain moveable property under Rs. 500 in value, to recover that property or its value from the defendant, Kálidás Umed, who had caused it to be attached in execution of a decree obtained by him against Vanarsi Rangji.

The question is, whether the Court of Small Causes has jurisdiction to entertain the suit, it appearing that the plaintiff's claim had been rejected upon an application made by him under section 246 of Act VIII of 1859, in the cause in which the decree, under which the attachment had been made, was passed. The Judge is of opinion in the affirmative, but has referred the question to this Court. *Woomesh Chunder Bose* v. *Muddun Mohun Sircár*[2] is in point—the suit there having been brought, as here, by the alleged owner of the property attached—and supports the jurisdiction of the Court of Small Causes. *Rám Dhun Biswas* v. *Kefal Bis-*

(1) 8 Mad. H. C. Rep. 36.

(2) 2 Calc. W. R. 44 Civ. Rul.

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was[1] is distinguishable, on the ground that the plaintiff there was not the alleged owner of the property, but the attaching decree-holder. The Judge, who referred that case to the High Court of Calcutta, did, expressly on that ground, distinguish it from *Woomesh Chunder Bose* v. *Muddun Mohun Sircár*.[2] Peacock, C.J., in his judgment does not notice that case; but his brief remarks would, so far as we understand them, appear to place no weight on the distinction, inasmuch as his decision appears to proceed upon the ground that "the suit, which by section 246 of Act VIII of 1859 is given to a party against whom an order under that section is made, is 'a suit to establish his right,'" which suit Peacock, C.J., and Mitter, J., thought "not maintainable in a Small Cause Court." *Jethábhái Bháichand* v. *Bái Lakhu*,[3] for which no reasons were given, also was a suit by a decree-holder, and, therefore, is not in point. *Rám Gopál Sháh* v. *Rám Gopál Sháh and others*[4] was a suit to enforce a mortgage lien, and, therefore, is not in point. In January 1870, L. Jackson, J., and Glover, J., in *Moozdeen Gázee* v. *Dinobundho Gossámee*,[5] which seems to have been a suit by the alleged owner of the property, treated that case as on all fours with *Rám Dhun Biswas* v. *Kefal Biswas*,[6] and they, accordingly, held that the Small Cause Court at Jessore could not entertain the suit; but, if we be right in gathering from the terms of the reference made by the Judge of that Court that the plaintiff there was the alleged owner of the property, that case does not seem to be on all fours with *Rám Dhun Biswas* v. *Kefal Biswas*[7] which was a suit by a decree-holder.

Janakiámmal v. *Vithenádien*,[8] decided in February 1870, is in point here—it being a suit by the alleged owner complaining of a wrongful seizure. The High Court of Madras (Scotland, C.J., and Innes, J.,) held that the Court of Small Causes had jurisdiction. That decision was followed in 1875 by Morgan, C.J., and Kindersley, J., in *Kundeme Naine* v. *Rávoo Latchmipati*[9] which also was a suit by the alleged owner to recover the property or its

(1) 10 Calc. W. R. 141 Civ. Rul.
(2) 2 Calc. W. R. 44 Civ. Rul.
(3) 6 Bom. H. C. Rep. 27 A. C. J.
(4) 9 Calc. W. R. 136 Civ. Rul.
(5) 13 Calc. W. R. 99 Civ. Rul.
(6) 10 Calc. W. R. 141 Civ. Rul.
(7) 10 Calc. W. R. 141 Civ. Rul.
(8) 5 Mad. H. C. Rep. 191.
(9) 8 Mad. H. C. Rep. 36.

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value. The reports of those Madras cases do not show that any of the Calcutta decisions above mentioned or the Bombay decision were brought to the notice of the Madras High Court. We do not think that the concluding passage in section 246 of Act VIII of 1859, which leaves it open to a party, against whom an order upon an application under that section has been made, "to bring a suit to establish his right at any time within one year from the date of the order," prevents a tribunal, before which such a party might have brought his suit if there had not been any application made under that section, from entertaining it. Whenever a person sues to recover property alleged to have been wrongfully taken from him, he sues to establish his right to it, and, if he did not so establish his right, he could not recover it *in specie* or compensation by way of damages for it. Whether the new Civil Procedure Code (Act X of 1877) allows such a suit as the present, by an alleged owner, to be brought in a Court of Small Causes, it will be time enough to say when the question arises. And we refrain from giving any opinion on the question whether or not an attaching decree-holder, against whom an order has been made under section 246 of Act VIII of 1859, can maintain a suit in the Court of Small Causes to establish his right to retain his attachment. We concur in the opinion of the Judge of the Court of Small Causes at Ahmedabad, that he may entertain the present suit.

[APPELLATE CIVIL.]

Before Mr. Justice West and Mr. Justice Pinhey.

November 19.

KHANDO NARAYAN KULKARNI (ORIGINAL DEFENDANT), APPELLANT *v.* APAJI SADASHIV KULKARNI (ORIGINAL PLAINTIFF), RESPONDENT.*

Bombay Hereditary Offices Act III of 1874—*Jurisdiction—Suit for declaration of right to officiate as sole representative of a branch of a vatandár family.*

From the date of the coming into force of the Bombay Hereditary Offices Act III of 1874, it is not competent to the civil Court to entertain a suit for a declaration of right to officiate as the sole representative of a branch of a vatandár family, the Act constituting the Collector a judge for this and other purposes of the Act.

* Special Appeal No. 32 of 1877.

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KHANDO NÁRÁYAN KULKARNI v. APÁJI SADÁSHIV KULKARNI.

THIS was a special appeal from the decision of C. F. H. Shaw, Judge of Belgaum, confirming the decree of the Subordinate Judge of Chikodi.

The plaintiff and the defendant were members of the same branch of a vatandár family, each holding an eighth share in a kulkarni vatan. The former in his plaint alleged that, as the representative of the eldest branch of the family, he was entitled to officiate solely, to the exclusion of the defendant, and by rotation with other branches of the family not before the Court. He asserted that the sole right in his branch belonged to him, and complained that the defendant, by getting his name entered in 1867 in the Collector's rotation list, had infringed that right. He, therefore, prayed for a declaration of his exclusive right to officiate in his branch.

The defendant denied the plaintiff's exclusive right, and contended that the civil Court had no jurisdiction to entertain the suit, the authority to take cognizance of it being vested in the Collector by Bombay Act III of 1874.

Both the lower Courts allowed the defendant's objection, and rejected the plaintiff's claim.

Shámráv Vithal for the special appellant:—A long course of the decision of the Bombay High Court shows that the civil Courts exercised jurisdiction in suits like the present before the passing of the Hereditary Offices Act: *Kushábá* v. *Collector of Puna*,(1) *Sangápá* v. *Sanganbusápá*.(2) Bombay Act III of 1874 does not, in clear and explicit terms, deprive civil Courts of the jurisdiction which they have been exercising. It does not give to the Collector a new jurisdiction, but simply prescribes a procedure in the exercise of the jurisdiction which he possessed under Act XI of 1843.

(1) Sp. Ap. No. 84 of 1876, decided 13th September 1876 by Westropp, C.J., and Nánábhái Haridás, J., p. 207 of printed judgments for 1876, not reported.

(2) Reg. Ap. No. 40 of 1875, decided by Westropp, C.J., and Nánábhái Haridás, J., on 20th September 1876, p. 214 of printed judgments for 1876, not reported. Both this case and the one cited above, seem to have been instituted while Act XI of 1843 was in force, which Act was repealed by Bombay Act III of 1874.

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KHANDO NÁRÁYAN KULKARNI v. APÁJI SADÁSHIV KULKARNI.

Mánekshàh Jehángirshàh, for the special respondent, was not called on.

WEST, J.:—In this case the owner of an eighth of a kulkarni's vatan sues the owner of another eighth share for a declaration of his right to officiate as the sole representative of the particular branch of the vatandár family to which they both belong. The lower Courts have rejected the claim as one of which their cognizance was barred by Bombay Act III of 1874. In special appeal it is urged that the jurisdiction of the ordinary civil Courts over such cases, having been previously established and exercised in numerous decisions, could not be withdrawn except by an express enactment which the Vatandárs' Act does not contain. Though the Collector may have full power, it is argued, to determine who shall officiate, and even who shall be recognized as amongst the class of those capable of officiating, yet, as to the abstract rights of the sharers *inter se*, the civil Courts may pronounce still as they did formerly before the passing of the new Act.

The plaintiff claims a right to perform the duties of an hereditary office to the exclusion of the defendant. Such duties, section 24 of the Vatandárs' Act says, shall be performed "by the representative vatandárs." Section 25 makes it the duty of the Collector to determine "what persons shall be recognized as representative vatandárs," and in several following sections rules are prescribed for the performance of this duty under different circumstances. According to section 40, clause 1, when there is a rotation of office-holding amongst the vatandárs, as the plaintiff says there is in this case, the Collector is to call on the registered vatandárs to elect an officiator on the occurrence of each vacancy. If a proper election be not made, the Collector is to take other steps for providing for the vacant office. The requisite investigations are, according to section 73, to be recorded in writing; and by section 77 an appeal is provided from the Collector to the Revenue Commissioner. Section 72 makes the investigation a judicial proceeding for the purposes of sections 193 and 228 of the Indian Penal Code.

Although, therefore, the provisions of an Act which transfers a class of determinations from the ordinary Courts to Executive

Officers are in some cases to be construed restrictively, (see *Winter* v. *Attorney-General of Victoria*,(1)) it appears to us that in the present instance the intention of the Legislature to transfer the jurisdiction from the ordinary Judges to the Collectors is too clear to be doubted. The Collector was formerly a merely executive officer, with a certain legal importance attaching to his acts under sections 19 and 20 of Regulation XVI of 1827, but subject to control in the performance of those acts by the civil Court. He has now been made a Judge for the particular purposes of the Vatandárs' Act. His jurisdiction in that character could not be interfered with so long as it was exercised in the way provided by the Act. See *Caledonian Railway Co.* v. *Sir Wm. Carmichael*,(2) the principle of which is involved in the cases of *Buroda Pershad* v. *Gora Chund*,(3) *Heera Chund* v. *Shama Churn*,(4) and *Rám Tarak* v. *Dinánáth*.(5) It is only essential that he conform to the mode of exercising his statutory power prescribed by the law which confers it. (See *per* Sir G. Jessel, M. R., in *Taylor* v. *Taylor*. (6))

It appears to us, then, that the civil Courts have no power to give to the plaintiff the declaration that he seeks, because not only can they not afford a consequential remedy, but because they can no longer establish a right which the Collector would be bound to respect. Every vatandár now is as against other co-vatandárs placed as regards the civil Courts in the same position that the rightful claimant to a *vadilki*, or right of eldership, formerly occupied. As the fact of being *vadil* gave to him in whom the quality was vested no preferential right beyond what appertained to the vatandárs generally, so now the relations of all the vatandárs *inter se* with reference to their recognition as representatives are placed entirely at the disposal of the Collector. The decision in *Abáji* v. *Niloji*,(7) therefore, applies to this case. That decision was recognized as binding in *Ningangavda* v. *Satyángavda*,(8) although another case was pointed to in which the right of action and the jurisdiction of the Court were recog-

(1) L. R. 6 P. C. 378.
(2) L. R. 2 Sc. Ap. 56.
(3) 12 Calc. W. R. 160 Civ. Rul.
(4) 12 Calc. W. R. 275 Civ. Rul.
(5) Beng. L. R. 184.
(6) L. R. 1 Ch. D 426.
(7) 2 Bom. H. C. Rep. 342.
(8) 11 Bom. H. C. Rep. 232.

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nized where the active enforcement in detail of the decree sought would devolve on another authority.(1) In such a case a right would be constituted which the other authority would have to respect; here, however emphatically the Courts might pronounce in favour of the plaintiff's sole right according to custom and prescription to officiate as kulkarni, still as both parties are admittedly and equally co-vatandárs, the Collector, and the Collector alone, could admit either or both of them to the class of representatives capable of officiating under the present law. This he would have to do on an investigation made by himself, and according to his own judgment, not according to the view taken by this Court. Its decree in favour of the plaintiff would thus be purely abortive. The establishment of the new jurisdiction thus excludes the older one, and the claim was rightly rejected. We confirm the decree of the District Court with costs.

Decree affirmed.

(1) *Sadat Alikhan* v. *Khajeh Abdul Gani*, 11 Beng. L. R. 203 P. C.

Note.—In *Bhujang Hanmáji Kulkarni* v. *Sanjiv Baswant and another* (special appeal No. 157 of 1877), decided by the same learned Judges on the 21st of November 1877, the plaintiff asked for a similar declaration as in the above case before the Bombay Hereditary Offices Act came into operation. Their Lordships allowed the claim, making (among others) the following remarks:—

"It is urged that the Bombay Vatandárs Act has taken the matter out of the jurisdiction of the civil Courts. But the Act says nothing as to pending suits, and, in the absence of such a provision, this suit, which was instituted before the Act was passed, is to be disposed of according to the law as it stood when the litigation began. Taking it as a correct proposition that the right of action formerly subsisting has now been withdrawn, 'it is a general rule that when the Legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them.'—*Per* Sir G. Jessel, M. R. *In re Suche & Co.*, L. R. 1 Ch. D. 48.

"We must therefore reverse the decree of the District Court, and award to the plaintiff the declaration that he is entitled to a moiety of the office of kulkarni. This decree will not affect the exercise, by the Collector, of any powers vested in him by the Vatandárs' Act, the parties on both sides being acknowledged sharers of the *vatan*."

[APPELLATE CIVIL.]

Before Sir M. R. Westropp, Kt., Chief Justice, and Mr. Justice Melvill.

CHINTO ABAJI KULKARNI (ORIGINAL DEFENDANT), APPELLANT *v.* LAKSHMIBÁI KOM SAKHARAM ANTAJI (ORIGINAL PLAINTIFF), RESPONDENT.* 1878 January 10.

Representative vatandárs—Bombay Hereditary Offices Act No. III of 1874 *—Jurisdiction of civil Courts.*

Since Bombay Act III of 1874 came into force, no suit will lie in a civil Court for a declaration that a person is eligible to officiate as a hereditary officer falling within the scope of that Act.

Since that Act became law, none but representative vatandárs, or their deputies or substitutes, can officiate; and the duty of determining what persons shall be recognized as representative vatandárs, is vested in the Collector, whose proceeding is a judicial proceeding.

THIS was a second appeal from the decision of W. H. Newnham, Acting Judge of Poona, affirming the decree of Dinánáth Atmárám Dálvi, Second Class Subordinate Judge at Junnar.

Lakshmibái brought this suit in 1876 to establish her right to a fourth share in the kulkarni vatan of Savargaon and Baste, and her right to officiate. The defendant, among other objections, pleaded that, under Bombay Act III of 1874, the civil Courts had no jurisdiction to try the suit, as he had been appointed by the Collector after due inquiry under that Act. Both the lower Courts held that they had jurisdiction, and allowed the plaintiff's claim on the merits.

Shámráv Vithal, for the appellant, contended that the cognizance of the suit by the civil Courts was barred by the Bombay Vatandárs' Act No. III of 1874, and cited *Khando* v. *Apáji* [1] in support of his contention.

No one appeared for the respondent.

WESTROPP, C.J.:—It does not appear that the right of the plaintiff to a share in the vatan property has ever been disputed by the defendant, or that any possession which she has had of it, or of a share in it, has been disturbed. So that, in deciding this case, our decree cannot affect her interest in, or possession of, that property in any respect. The Subordinate Judge has declared

* Second Appeal No. 270 of 1877.

[1] *Supra*, p. 370.

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her to be the representative vatandár of her husband's branch of the family. The High Court, even before the passing of Bombay Act III of 1874, never went so far as to declare any member of a family or branch of a family of vatandárs to be the representative of that family or branch. It expressly refused so to do: *Abáji* v. *Niloji*.(1) It has declared a person to be eligible to officiate—*Ningangavda* v. *Satyángavda*(2)—but not that he was so in preference to any other member of the vatani family. Since Bombay Act III of 1874 became law, none but representative vatandárs or their deputies or substitutes, as provided for in the Act, can officiate (section 24), and the duty of determining what persons shall be recognized as representative vatandárs is vested in the Collector (section 25). His proceeding is a judicial proceeding (section 72), and there is an appeal from him to the Revenue Commissioner (section 77). These enactments seem to us to exclude by direct implication any right on the part of the civil Courts to declare that persons are eligible to serve as hereditary officers falling within the scope of Bombay Act III of 1874. It has already been determined here, in the case of *Khando* v. *Apáji*,(3) that a suit will not lie in a civil Court to declare a person exclusively entitled to officiate as a hereditary officer. The principle on which that decision was arrived at is applicable in this case.

We think that, since the Act of 1874 came into force, no suit will lie in a civil Court for a declaration that a person is eligible to officiate as a hereditary officer falling within the scope of that Act. The present suit was instituted on the 12th June 1876, and is, therefore, governed by that Act;—and as the plaintiff's interest in the vatani property has not been assailed, we do not think that she has any cause of action. We reverse the decrees of the Courts below, and direct the plaintiff to pay the defendant his costs of the suit, and the parties respectively to bear their own costs of both appeals.

Decree reversed.

(1) 2 Bom. H. C. Rep. 342. (2) 11 Bom. H. C. Rep. 232. (3) *Supra*, p. 370.

[APPELLATE CIVIL.]

Before Mr. Justice West and Mr. Justice Pinhey.

RANGUBAI (ORIGINAL DEFENDANT), APPELLANT *v.* BHAGIRTHIBAI (ORIGINAL PLAINTIFF), RESPONDENT.*

1877 October 10.

Hindu law—Adoption—Competency of a wife to give in adoption—Conditional adoption—Non-fulfilment of a condition—Mistake of fact.

According to the Hindu law prevailing in the Bombay Presidency a wife is not competent to give her son in adoption against the will, express or implied, of her husband, the father of that son, or under circumstances from which the husband's dissent can be inferred.

Where the natural father of the son given in adoption wrote to the adoptive mother, a widow, giving his consent to the adoption on certain conditions.

Held that a non-fulfilment of one of the conditions rendered the adoption invalid, notwithstanding that the condition was unnecessary, and imposed in consequence of a mistake as to the necessity for the assent of Government to the adoption.

THIS was an appeal from the decision of P. S. Binivále, Subordinate Judge, First Class, at Ahmednagar.

The Nimbálkars owned considerable moveable and immoveable property at Mirajgam, in the district of Ahmednagar. On the death of Gajrábái, the proprietress, the property devolved on Jayavantráv, who belonged originally to the Ranadive family, but had been adopted into the Nimbálkar family by Gajrábái.(1) At the time of Jayavantráv's adoption (4th February 1865) he was a grown-up man with two unmarried daughters, Bhagirthibái, the plaintiff, and Rangubái, the defendant in the present suit. Jayavantráv died on the 15th April 1869, leaving him surviving his widow Gangábái, his daughter Bhagirthibái, who had married in the meanwhile, and his daughter Rangubái, who had not then been married.

On Jayavantráv's death the property devolved on Gangábái, who continued in possession till her death on the 25th of January 1872.

The plaintiff alleged that, ten days before her death, Gangábái had adopted Gájrájiráv, the son of her sister, Vithábái. At the time of the alleged adoption, Gájrájiráv was an infant, fourteen

* Regular Appeal No. 26 of 1877.

(1) See 4 Bom. H. C. Rep. A. C. J. 191.

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months old. He died on the 23rd August 1872, three months after the defendant Rangubái's marriage, and the plaintiff claimed from Rangubái a half share in the Mirajgam estate, on the ground that both the plaintiff and the defendant were the married sisters of Gájrájiráv, the last legal owner. The plaintiff's evidence went to show that the consent of the boy's natural father to the adoption was contained in two letters (exhibits 31 and 32), in which he insisted that, before the adoption was made, the adoptive mother must obtain the consent of the British Government, of her own family, and of the bankers of the town. The consent of Government never was obtained.

The defendant denied the fact of adoption, and disputed its validity, asserting that she, being unmarried at the time of her father Jayavantráv's adoption, was then engrafted with him into the adoptive Nimbálkar family; and finally claimed to have a preferential right to succeed to Gájrájiráv's property, supposing his adoption to have been both genuine and valid.

The Subordinate Judge held the adoption proved; and, finding that the plaintiff and the defendant were both married sisters at Gájrájiráv's death, awarded the half share claimed.

Shántárám Nárayan for the appellant:—Our first objection is that Gájrájiráv was never, in fact, adopted. In the second place we say the adoption, even if made, is invalid. The plaintiff has brought forward evidence to show that Vithábái, with the permission of her husband Khrishnaráv, gave their son in adoption to Gangábái. It will not be disputed that Vithábái without such permission could not give away the child— *Náráyan* v. *Náná*[1] and *Bashetiáppá* v. *Shivlingáppá*[2]—and the chief evidence to prove the permission consists of two letters, Nos. 31 and 32, addressed by Krishnaráv to Gangábái and her father and uncle. In these letters Krishnaráv grants the permission to adopt, subject to the prior fulfilment of three conditions: viz., 1, the sanction of the British Government; 2, the approval of the members of the adoptive family; and, 3, the approbation of the bankers of Mirajgam. The two latter conditions may have been performed, but the

(1) 7 Bom. H. C. Rep. 153 A. C. J.

(2) 10 Bom. H. C. Rep. 268. See *Raja Vyankatráv* v. *Jayavantráv*.

first was not. Moreover, Gájrájiráv was the only son of Krishnaráv, and could not be given away: *Raja Upendra Lal Roy* v. *Shrimati Ráni Prasanna Mayi*.(1)

[WEST, J.:—On this point the Courts have held differently in this Presidency. A great conclave of the sastris at Poona declared that, although it might be very wicked in the giver to give away an only son, the adoption, if otherwise unobjectionable, was not invalid. The Privy Council, in *Nilmadhub Doss* v. *Bishumber Doss*,(2) recognizes the possibility of the adoption of an only son.]

But, admitting the adoption to have been made, and to be valid, we say that at Jayavantráv's adoption the position of the plaintiff, who was married, remained unaltered. She never became a Nimbálkar: *Raghunadha* v. *Sri Brizo Kishoro*.(3) Sir James Colvile, who delivered the judgment of their Lordships in that case, observes at page 191: "The Hindu wife, upon her marriage, passes into and becomes a member of that family."

Vishvanáth Náráyan Mándlik, for the respondents:—The adoption of Jayavantráv was duly authorized and performed. [Goes into evidence to show the *factum* of adoption.] In letters 31 and 32 Krishnaráv, after imposing three conditions, leaves it entirely to the adoptive mother Gangábái to act as she pleases. Two of the conditions imposed have been complied with. The third one, as to obtaining the previous sanction of the British Government, is unnecessary, and founded on a mistake of fact. The conditions, as a whole, were complied with.

He then cited the following:—1 Strange H. L. 91; 1 Story Eq. Jur. 182, 183; Leake on Contr. 357; Act IX of 1872, ss. 22 and 189; 1 Domat's Civ. Law 499; *Kennedy* v. *Panama Company*.(4)

WEST, J.:—We are of opinion that it is not within the competence of a wife, according to the Hindu law prevailing in this part of India, to give a son in adoption against the will, express or implied, of her husband, the father of that son. The principal authorities are quoted in the judgment of Sir M. Westropp, C.J.,

(1) 1 Beng. L. R. 221 A. C. J.
(2) 13 Moore I. A. 85.
(3) L. R. 3 Ind. App. 154.
(4) L. R. 2 Q. B. 580; see p. 588.

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in *Náráyan* v. *Náná*[1] and *Bashetiáppa* v. *Shivlingáppa*.[2] There is a certain degree of ambiguity in the original passage of Manu (ch. IX, 168),[3] arising from the use of singular nominatives with a disjunctive particle along with a verb in the dual; but the two principal commentators, Medhatithi and Kulluka, have both construed the passage as requiring the concurrence of both parents to a giving in adoption. According to Vashista, quoted in the Dattaka Chandrika, a woman is not either to give or to take in adoption without the assent of her husband; and though Dewandha Bhat urges that non-prohibition may constitute assent, he applies this only to the cases of the husband's being dead, or having emigrated, or entered a religious order. The Dattaka Mimansa, which is of high authority on the subject of adoption, allows the father to give in adoption without the assent of the mother, but not the mother to give without the assent of the father. The Vyavahara Mayukha repeats the text: "Let not a woman give or accept a son without the consent of her husband,"[4] and the Mitakshara is to the same effect.[5] A mother may give a son with her husband's consent during the husband's absence or after his death, though ordinarily he is to be given by the father or by both parents. The absence here contemplated is manifestly not such an absence as is compatible with the interchange of letters by post; it means an absence shutting out the mother from communication when some emergency has arisen which

(1) 7 Bom. H. C. Rep. 153 A. C. J.; see pp. 167-8.

(2) 10 Bom. H. C. Rep. 268; see pp. 271-2.

(3) मातापितावादद्यातां यमाद्भिपुत्रमापदि। सदृशं प्रीतिसंयुक्तं सज्ञे योदत्रिमः सुतः॥ *Mátá pitá vá dadyátám* yamadbhih putramápádi, sadrisám prîtisañyuktam sa jñeyo datrimah sutah: "He is called a son given whom his father or mother affectionately gives as a son, being alike [by class] and in a time of distress; confirming the gift with water."—Mit., chap. I, sec. XI, pl. 9.

(4) नतु स्त्रीपुत्रन्दद्यात्प्रतिग्रयग्रहीयाद्वान्यत्रानुज्ञानाद्भर्तुः। Na tu strîputran dadyát pratigrihnîyát ványatránujñánád bhartuh. See Borr., chap. IV, sec. V. 16.

(5) माता भर्त्रनुज्ञया प्रोषिते प्रेतेवा भर्तरि पिता वोभाभ्यां सवर्णाय यस्मै दीयते स तस्य दत्तकपुत्रः Mátrá bhatranujñayá proshite prete vá bhartari pitrá vobhábhyám savarnáya yasmai dîyate sa tasya dattakah putrah: "He who is given by his mother with her husband's consent, while her husband is absent, [or incapable though present] or [without his assent] after her husband's decease, or who is given by his father, or by both, being of the same class with the person to whom he is given, becomes his given son (dattaka)."—Mit. chap. I, sec. XI, pl. 9.

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would justify the giving of the son. Even in that case, the Mitakshara and the Mayukha seem to regard the consent of the father as indispensable, though, possibly, the condition of absence in the intended sense may be read grammatically in the Mitakashara as a condition, the satisfaction of which would enable a woman on a proper occasion to act without the express assent of her husband.

It would be going far beyond this to allow that a woman may give away her and her husband's only son, while she is on a visit, having the child with her, and while her husband is within reach of communication in a few days by post, not only without his assent but against his will. If his dissent has been expressed, or can be inferred, there is no authority for reducing him through the folly or the caprice of his wife, who may be subjected to very injurious influences, to the painful condition of sonlessness.

In the present case the documents Nos. 31 and 32 addressed to Gangábái, the intended adoptive mother, and to her father and uncle, express in the most emphatic terms and repeatedly that the writer Krishnaráv, father of the intended adoptive son, will consent to the adoption only if the assent of the British Government be previously obtained. "Without the prior order of the British Government," he says (31), "you are not to make the adoption, because there have been former wrangles about your estate. Therefore, first get the order of Government, and then do the thing." The father and uncle of Gangábái are (32) "to obtain the prior assent of the British Government," and not "by proceeding without it to place the boy in a ruinous dilemma." "Without the prior order of the British Government," he repeats, "do nothing at all, as I have not five or ten sons; only this one." These letters were received the day before the alleged adoption was carried out. Krishnaráv has deposed that he had given permission to his wife Vithábái to give the boy in adoption. His examination contains statements which show that, notwithstanding his respectable social position, he is utterly unworthy of credit as a witness; but, even if any communication had passed orally or by letter between him and Vithábái on the subject of the adoption, his instructions would be superseded by the letters Nos. 31 and 32 which immediately preceded the adoption. These expressed

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his will as it existed then. Vithábái was in the house of her sister Gangábái when they arrived (135, 337), and they were read out at the adoption. She had not, and could not suppose she had, authority after these letters had been received, to give her son in adoption without the condition that Krishnaráv had attached to his assent being satisfied. Until assent of the British Government had been obtained, and "an order issued in the boy's favour as to all the possessions" of the family, his language conveyed an absolute prohibition to the proposed adoption.

It has been contended before us, by Ráv Sáheb Vishvánáth Náráyan Mándlik for the respondent, that the condition as to the prior sanction of the Government being but one of three (the other two being the assent of the family and the approval of the sáukars), the other two of which were substantially complied with, a literal fulfilment of it was not to be exacted. If the group of conditions, viewed as a whole, was substantially satisfied, Krishnaráv's desire was, it is said, sufficiently fulfilled, and the adoption must be taken to have been made with his assent. It is obvious, however, that he, having a right to impose his own terms, made the prior assent of the Government to the adoption an essential, if not the principal, condition of his own assent. It could not be dispensed with or relieved against. An adoption made in disregard of it was no adoption at all. But his requirement, it is further urged, was grounded on an entire mistake. The estate, having come under the summary settlement, had been reduced to the condition of private property. Krishnaráv's principal object had already been attained, and there being thus no necessity to apply to the Government for a sanction to the proposed adoption, the condition he had imposed was satisfied, or, being grounded on an erroneous conception, needed not to be satisfied. His assent, free from all conditions, was to be inferred when the condition he had imposed was one of no practical importance. But the only document (225) relating to the summary settlement of the estate dates from 1864. It is not to be supposed that in the course of the negotiations connected with the adoption, Krishnaráv had not become acquainted with it, and the reason he assigns, of family wrangles, might reasonably make him desirous of having the estate secured to his son by an express decision of the

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Government, even though it had been brought under the summary settlement. There was a part of the estate, too, the *patilki inam* at least, which was not included within the provisions of the Summary Settlement Act. It cannot, then, we think, be assumed, that, even if Krishnaráv had known all the facts, he would not still have insisted on his conditions. The important point, however, is, that he did insist on them down to the time of the adoption. They may have been based on erroneous conceptions and groundless fears on his part, but this did not make them less the expression of his present will. The mere fact that a man might have judged more wisely or have obtained more accurate information, does not justify those to whom his permission is requisite for a legal transaction to think and judge for him. His volition and its legal consequences are, in fact, not affected by a mistake under which he may labour.(1) The business of the other parties concerned is not to supersede but to persuade him. Krishnaráv's prohibition, therefore, however ill-founded—the prior sanction of Government having admittedly not been obtained—made all the proceedings in the pretended adoption simply abortive. The claim of the respondent has not been rested on any other ground than that of a joint succession to the estate which having by his adoption vested in the son of Krishnaráv, descended to the respondent and her sister, the appellant, in equal moieties. As the adoption never was valid, Gangábái died sonless, and the alleged right of the respondent Bhagirthibái, as against her unmarried sister Rangubái, never arose.

We must, therefore, reverse the decree of the Subordinate Judge, with appellant's costs throughout on respondent.

Decree reversed with costs.

(1) Savigny System, vol. 3, s. 115; Coleb. Dig., b. II, ch. IV, t. 54 Comm.; Story's Eq. Jur., ch. 34.

[APPELLATE CRIMINAL.]

Before Mr. Justice Melvill and Mr. Justice Pin.

1877
October 4.

IMPERATRIX *v.* PADMANABH PAI.*

The Code of Criminal Procedure (Act X of 1872), Section 468—Sanction to prosecute—Relative positions of a Magistrate of the First Class, the Magistrate of the District, and the Court of Session.

For the purposes of section 468 of the Code of Criminal Procedure (Act X of 1872) a Magistrate of the First Class is subordinate to the Magistrate of the District: a sanction given by the latter to prosecute a person for intentionally giving false evidence before the former is, therefore, legal and sufficient, notwithstanding the refusal by the former to give such sanction himself.

Semble that the Sessions Court has not power to give such sanction.

PADMANABH was convicted by a First Class Magistrate on alternative charges of having given false evidence. The perjury was assigned upon two contradictory statements made by the accused before two other First Class Magistrates, Mr. Monteath and Mr. Thakur, the former of whom gave the sanction to a prosecution required by section 468 of Act X of 1872, but the latter refused to give a similar sanction in respect of the statement made by the accused before him. The District Magistrate, however, upon application being made to him, granted a sanction in respect of the statement made before Mr. Thakur, and the trial proceeded with the result stated above.

Padmanabh appealed to the Session Court, which annulled the conviction and sentence of the First Class Magistrate, on the ground that there had been no legal sanction for a prosecution in respect of the evidence alleged to have been given by the accused before Mr. Thakur.

The High Court, on an examination of the First Class Magistrate's criminal calendar for March 1877, sent for the record and proceedings in this case, and the Government of Bombay appealed from the decision of the Session Court, reversing the conviction.

Nánábhái Haridás, Government Pleader, for the Crown:—The question for determination is whether, for the purposes of section 468 of the Code of Criminal Procedure, a Magistrate of the First Class is subordinate to the Magistrate of the District or the Court of Session. The Code by section 37 has distinctly provided that

* Criminal Review No. 103 of 1877. Appeal No. 174 of 1877.

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all Magistrates of the First, Second, or Third Class in a district shall be subordinate to the Magistrate of the District. The Legislature is not content with doing this; it emphasizes the expression of its command by further directing that "neither the Magistrate of the District nor the Subordinate Magistrates shall be subordinate to the Session Judge, except to the extent and in the manner provided by this Act." The positive assertion of one status, coupled with an emphatic denial of a contrary status, should be considered as conclusive, especially when it is borne in mind that a different state of things existed under the old Code, and to remove all doubts the peremptory negation was newly enacted. Sections 44, 45, and 296 show that the subordination is not executive or departmental merely, but judicial. Section 44 speaks of a 'transfer,' and section 45 of a 'reference' of a criminal case, both judicial acts. Section 296 speaks of the 'dismissal of a complaint,' and the 'discharge of an accused person,' also judicial acts. [MELVILL, J.:—Section 328 gives the Magistrate of the District power to set aside a conviction, which certainly is a judicial act.]

Shámráv Vithal, for the accused :—The Code contemplates two sorts of subordination, viz., executive and judicial. The former covers such acts as are spoken of in sections 44 and 45. The test of the latter is this—To whom does an appeal lie if there has been an error. And it is clear that, except in the trivial case of giving security for good behaviour, mentioned in section 267, the Court of Session is the tribunal to which appeals lie from the judicial acts of the Magistrates of the First Class.

Section 468 speaks of the sanction of the Court before or against which the offence was committed, or of some 'Court' to which such 'Court' is subordinate. The Code nowhere speaks of the Magistrate of the District as a 'Court.' His 'Court' is that of a Magistrate of the First Class. [See section 5.] In the exhaustive list which the Legislature gives of the powers of a Magistrate, it makes no mention whatever of the power of the District Magistrate to sanction prosecutions under sections 468 and 469 for offences committed before Magistrates of the First Class.

MELVILL, J., after reviewing the facts of the case stated above, proceeded :—Section 468 of the Code of Criminal Procedure re-

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quires that the sanction to a prosecution should be given by "the Court before or against which the offence was committed, or of some other Court to which such Court is subordinate."

The decision of the Session Court proceeded upon the ground that, although, in certain executive matters, all Magistrates are subordinate to the Magistrate of the District, yet that such subordination is not of a judicial character, and that, as a Court, a Magistrate of the First Class is not subordinate to the Court of the Magistrate of the District, but to the Court to which appeals from the decisions of a Magistrate of the First Class ordinarily lie, *i.e.*, to the Court of Session.

There is no doubt a good deal to be said in favour of the view adopted by the Session Judge. Section 5 of the Criminal Procedure Code divides the Criminal Courts in British India into four grades only, and one of these is the Court of the Magistrate of the First Class. The Court of the Magistrate of the District is only the Court of a Magistrate of the First Class, and *primâ facie* the Courts of other Magistrates of the First Class would be co-ordinate with, and not subordinate to, another Court of the same grade. We have little doubt that when sections 468 and 469 of the present Code were first enacted in Act XXV of 1861 (sections 169 and 170), it was intended that the sanction contemplated should be given by the Court before which the offence was committed, or by the Appellate Court, or the High Court. And it is probable that when section 23G was added to the old Code, and afterwards when section 37 of the present Code was enacted, it was not intended to introduce any change in the law upon this point. But these sections most distinctly provide that all Magistrates, of whatever class, shall be subordinate to the Magistrate of the District: and on a careful consideration of section 37 of the present Code and a comparison of its provisions with those of other sections, we are unable to come to the conclusion that such subordination was intended to be of a merely executive, and not of a judicial, character. On the contrary, there are many sections of the Code which clearly provide for the judicial subordination of the Court of a Magistrate of the First Class to the Magistrate of the District. For example, the Magistrate of the District may in certain cases

set aside a conviction by a Magistrate of the First Class (section 328); he may order a committal for trial in session cases, if he thinks that a complaint has been improperly dismissed, or that an accused person has been improperly discharged by a Magistrate of the First Class (section 296); and in certain cases he may even hear an appeal against the order of such Magistrate (section 267). In all these instances the Magistrate of the District is acting judicially, and as a Criminal Court, within the definition of that term in section 4. In these instances, at all events, the Court of the Magistrate of the First Class is subordinate to the Court of the Magistrate of the District: and we can find no sufficient reason for saying that the same subordination does not exist for the purposes of section 468. We think that the sanction of the Magistrate of the District in this case must be regarded as a legal and sufficient sanction, and that the order of the Session Court must, therefore, be set aside, and the appeal of Padmanabh must be heard and disposed of by that Court on the merits.

We should certainly have preferred to hold that, for the purposes of sections 468 and 469, a Magistrate of the First Class is subordinate, not to the Magistrate of the District, but to the Court of Session. It is very essential that the Court of Session either when sitting in appeal, or when trying a case committed to it by a Magistrate of the First Class, should have the power to sanction a prosecution for the offence of false evidence or of forgery, committed in the Court of the Magistrate. It is not necessary for us now to decide whether the Court of Session has or has not such power. But in the absence of any express provision to that effect in the Code, it is impossible not to see that it would be difficult to hold that the Court of Session has such power, in the face of the words of section 37—"neither the Magistrate of the District, nor the Subordinate Magistrates shall be subordinate to the Session Judge, except to the extent and in the manner provided by this Act." We think it well to suggest this difficulty, in order that the Legislature may remove it, should it see fit to do so, when the Code of Criminal Procedure is again revised.

It may also be observed that, although chapter IV of the Code professes to give an exhaustive list of all the powers which may

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be exercised by the Magistrates, no mention is made of any power of the District Magistrate to sanction a prosecution under sections 468 and 469. Padmanabh's pleader has argued from this that the Magistrate of the District has no such power in the case of offences committed before a Magistrate of the First Class. But the argument is deprived of weight by the circumstance that the list in question equally omits all mention of the District Magistrate's power, (which is unquestioned,) to sanction prosecutions in respect of offences committed before Magistrates of the lower grades. The list in question is useless, unless exhaustive: and it is for the Legislature to consider whether the omission here noticed, ought not to be supplied.

Order accordingly.

[ORIGINAL CIVIL.]

Before Sir M. R. Westropp, Kt., Chief Justice, Sir Charles Sargent, Kt., Justice, and Mr. Justice West.

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LALLUBHAI BAPUBHAI, KANDAS MULCHAND, RAMDAS JAGMOHANDAS, AND MANIKJI DHANJIBHAI (ORIGINAL PLAINTIFFS), APPELLANTS *v.* MÁNKUVARBÁI, WIDOW AND EXECUTRIX OF GANGADAS VIZBHUKANDAS, WHO WAS SURVIVING EXECUTOR OF MULJI NANDLÁL AND BHÁISHET TRIKAMLÁL AND JAIKISANDÁS GANGÁDÁS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Hindu executor, rights of—Limitation—Act XIV of 1859, *Section I, clauses* 12 *and* 16, *and Section* 2—*Trustee—Adverse possession—Inheritance, Female right of—Sapinda-relationship what constitutes—Gotraja-sapinda.*

1. The rule of English common law, that the undisposed of residue of personal estate vests in the executor beneficially, does not apply to the will of a Hindu testator in India.

2. In the exercise of the testamentary power amongst Hindus, the intention to disinherit must be clear and unambiguous. Mere bequests of special portions of the testator's estate to the heir, without language of disherison, do not exclude him from the undisposed of residue.

3. An executor, who by the will is made an express trustee for certain purposes, is, as to the undisposed of residue a trustee, within the scope of section 2 of Act XIV of 1859, for the heir or heirs of the testator.

* Suit No. 563 of 1870, Appeal No. 196 of 1872.

4. In the Presidency and Island of Bombay the wife is a *sapinda* as well as a *gotraja* of her husband, and, if he die (without leaving a son or grandson), she, on the subsequent death of his separated *sapinda*, and in the absence of any specially designated heir entitled to preference, ranks in the same place in the order of succession to the property of such separated *sapinda* as her husband would have occupied if he were living. Thus the widow of a first cousin *ex parte paternâ* of the deceased *propositus* was held prior in order of succession to a fifth male cousin *ex parte paternâ* of the same.

5. Or, in other words, a wife becomes by her marriage a *sagotra-sapinda* of her husband and his *gotraja-sapindas*, and in that capacity succeeds as a widow to property which he would have taken as a *sapinda* before the male representative of a remoter branch.

6. The Institutes of Manu, the Mitakshara, and the Mayukha, although of great authority in the Presidency of Bombay, are all subject to the control of law and usage. No one of them is, as a whole, in full force in any part of the Presidency. In all of them there are precepts which, if they ever were practical law, have, for a time beyond the memory of living men, been obsolete.

7. *Salter* v. *Cavanagh*,[1] *Lakshmibái* v. *Jayrám Hari*[2] followed and approved.

THE plaintiffs sued for an account of the estate and effects of one Mulji Nandlál, the undisposed of residue of which they claimed as his nearest heirs.

Mulji Nandlál died on the 15th January 1840, leaving a widow Sarasvatibái, and one daughter Jethibái, who was married to Haridás Kásidás. By his will, made in the Guzerathi language, he disposed only of a portion of his property which was of consider able amount, and consisted both of real and personal property; and he appointed Gangádás Vizbhukandás, his first cousin by the father's side, and Trikamlál Avechuldás, his nephew, to be his executors. The executors proved the will and entered into possession of the estate. Jethibái died without issue in May 1841, leaving her husband Haridás Kásidás surviving. Trikamlál died in 1842, and, after his death, the other executor, Gangádás, continued in sole possession of the personal estate, and received the rents and profits of the real estate of the testator, allowing the widow Sarasvatibái a sum of Rs. 25 per month for her maintenance.

(1) 1 Drury and Walsh 668. (2) 6 Bom. H. C. Rep. O. C. J. 152.

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Gangadás died in May 1861, leaving a widow, the defendant Mánkuvarbái, and three daughters. By his will he appointed Mánkuvarbái his executrix, and she thereupon took possession of his estate and of the estate of Mulji Nandlál.

Sarasvatibái died on the 20th March 1862 intestate, and without issue. The following paragraphs of the plaint set forth the plaintiffs' claims in this suit :—

14. "The plaintiffs contend that the residue of the said Mulji Nandlál's estate was undisposed of by his will, and that, in the events which have happened, the said Sarasvatibái became beneficially entitled thereto, and that on her death, intestate and without issue, it passed, according to Hindu law, to the nearest male heirs of the said Mulji Nandlál.

15. "The plaintiffs and the said Mulji Nandlál are, respectively, descended from two brothers, Jivandás Motiláll, the ancestor of the plaintiffs, and Narsidás Motiláll, the ancestor of the said Mulji Nandlál. At the time of the death of the said Sarasvatibái there was no male descendant of the said Narsidás Motiláll alive, and the plaintiffs then were and are now the nearest male descendants of the said Jivandás Motiláll, and, as such, the heirs and legal personal representatives of the said Mulji Nandlál."

The defendant Mánkuvarbái in her written statement pleaded that the suit was barred by the provisions of the Limitation Act XIV of 1859. She further alleged that Haridás Kásidás, who as the surviving husband of Jethibái, the only child of the testator, was believed to be entitled to the residuary estate of the said Mulji, had for valuable consideration assigned his interest in the said estate to Bháishet Trikamlál on the 26th January 1863, and that on 7th January 1874 the said Bháishet Trikamlál had executed a release to the defendant Mánkuvarbái of all claims against her relating to Mulji's estate.

She further stated that, in February 1868, she (Mánkuvarbái) had duly adopted one Jaikisandás as son to her deceased husband Gangádás Vizbhukandás, and she submitted that the said Jaikisandás was lawfully entitled to the residuary estate of Mulji.

The other defendants to the suit also put in written statements.

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The suit came on for trial before the Honourable Mr. Justice Bayley. The principal issue raised, was whether the plaintiffs were the nearest heirs of Mulji Nandlál according to Hindu law, and the learned Judge, following the decision in *Lakshmibái* v. *Jayrám Hari*,(1) recorded his finding in the negative, and passed a decree for the defendants.

The material facts and the subsequent proceedings in the suit are fully stated in the judgment of the Chief Justice. The annexed table shows the relationship of the various parties.

The appeal was heard by a Full Bench consisting of WESTROPP, C.J., SARGENT and WEST, JJ.

Farran and *Badrudin Tyabji* for the appellants :—The main points involved in this case are these: 1st, whether, according to Hindu law, the term *gotraja* includes females at all ; and, 2nd, if it does, whether the widow of a *gotraja-sapinda* is herself a *gotraja-sapinda*. As to the first point, we say no ; because Manu lays down the general principle that females cannot inherit. That the general effect of Manu's doctrine is to exclude all women from inheritance, see *Vijiárangam* v. *Lakshuman*.(2) The authors of the Mayukha and Mitakshara both rely on Manu, and nowhere controvert his general proposition further than that they specially name as heirs certain females occupying very special positions and not mentioned by Manu. They do not lay down the broad proposition that females are capable of inheriting generally, and where they name a particular female as heir, they explain the reason why she is so to be considered. Thus, Nilakantha in pl. 2, 10, 14, 18, 19(3) shows why a man's wife, daughter, mother, grandmother, and sister, respectively, are to inherit. So in the Mitakshara, ch. II, secs. 1—5.(4) From the section last cited, mentioning the grandmother *and gotrajas*, we have to conclude whether or not the Mitakshara intends that females generally should inherit.

To support the respondents' contention on this point, it will be necessary for this Court to hold that the Mayukha and Mitakshara

(1) 6 Bom. H. C. Rep. O. C. J. 152.
(2) 8 Bom. H. C. Rep. 244 O. C. J. ; see p. 258.
(3) See Stokes' Hindu Law, Vyav. Mayukha, chap. 4, sec. 8.
(4) See Stokes' Hindu Law, Mitakshara, chap. 2

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intend females generally to inherit. But, as we have seen, certain females only are enumerated as capable of inheriting, and those are females in a very peculiar category; while, on the other hand, no mention at all is made of those near female relations whom we should have expected to have been named as heirs, if all females were capable of inheriting generally. If females were intended to inherit generally, a brother's daughter would have come into the enumeration immediately after a brother's son; but there is no mention whatever of a brother's daughter. Great-grandmothers take; but that is on the same principle as that which allows mothers and grandmothers to take. This is shown from their taking before great-grandfathers; but it does not follow that the widows of collaterals are to take immediately after their husbands, as is laid down in West and Bühler. The contrary rather is to be inferred; because, if they did so take, they would exclude their own sons. The correctness of the judgment in *Lakshmibái* v. *Jayrám Hari*[1] is, in fact, now on its trial. That judgment, we say, was based on insufficient authority, being founded entirely on the law laid down in West and Bühler. The Full Bench ruling in *Amrita Kumári* v. *Lakhi Náráyan*[2] supports the proposition that women other than those enumerated in the Mitakshara do not take under that law, and *Girdhárilál* v. *The Government of Bengal*[3] contains a like decision on the same point that a sister's son can take. In *Thakoorain* v. *Mohun Lal*[4] there is a general proposition stated that a sister's son cannot take; but this is got over in both the cases last cited as being merely a *dictum* in a case in which the contention was between a sister's son and a *gotraja-sapinda*, so that the point whether the former could take at all, never really arose. Lastly, Strange lays it down that, as a rule, women are incompetent to inherit.[5]

As to the second point in this case; assuming that women are capable of inheriting generally, the question arises,—does the widow of a first cousin exclude a more distant male relative? Again, we say no; and in support of this contention rely on 1st

(1) 6 Bom. H. C. Rep. 152 A. C. J.
(2) 2 Beng. L. R. 28 F. B.; see p. 43. (3) 1 Beng. L. R. 44. P. C.
(4) 11 Moo. Ind. Ap. 386; S. C. 7 Calc. W. R. 25 P. C.
(5) 1 Str. H. L. 168.

West and Bühler, 148, 159, 163. A first cousin's widow can only seek to come in as a *gotraja*; and the question here is whether, according to Nilakantha, she is a *gotraja*; but Nilakantha, under the term *gotraja*, intends to include only those originally born in the family.[1] Nor can a woman by marriage be born into the *gotra* of her husband, for Nilakantha holds that a married sister still belongs to the *gotra* of her brother, and no person can belong to two *gotras*.

Upon the other points in the case the following authorities were cited: *Hunt and Bateman*, 10 Ir. Eq. Rep. 360; *Salter* v. *Cavanagh*, 1 Dru. and Walsh; *Gibbs* v. *Rumsey*, 2 V. and B. 294; *Thomas* v. *Thomas*, 2 K. and J. 79; *Mapp* and *Elcock*, 2 Phill. 79, S. C. 3 H. L. C. 492; *Pelley* v. *Bascombe*, 33 L. J. Ch. N. S. 100, S. C. 34 L. J. Ch. N. S. 233; *Lalchand* v. *Gumtibái*, 8 Bom. H. C. Rep. 140 O. C. J.; *Báboo Lall Doss* v. *Jamál Ally*, 9 Calc. W. R. 187; *Musst. Khyroonissá* v. *Salehooniássá*, 5 Calc. W. R. 238; *Umá Sundári Dási* v. *Dwárkenáth Roy*, 2 Beng. L. R. 284 A. J.

Scoble (Advocate-General), *Latham*, and *Kasináth Trimbak Telang*, for the respondents:—Both under the Mayukha and the Mitakshara a woman is by marriage born into her husband's family.[2] The author of the Mayukha places the paternal grandmother first among the *gotraja-sapindas*. Her right is not conferred on her by the text. The right exists independently of the text, which only points out what is her position in the class. From the original Sanskrit it is clear (though the meaning is obscured in the translation) that by marriage a sister passes from the *gotra* of her brother into the *gotra* of her husband. Unless a woman were by marriage born into the *gotra* of her husband she could not be *gotraja-sapinda* to her grandson. For the purposes of inheritance a woman may be *gotraja* in two families, in one by right of birth, in the other by right of marriage. The proposition of the other side, that Manu is opposed to inheritance by females, is unsupported by authority; nor does *Vijiárangam* v. *Lakshuman*[3] go so far as was contended for. The text of Manu—"a wife, a son, and a slave, have no wealth of their own"—is referred to in the Mayukha, and explained to mean wealth earned by mechanical arts

(1) 1 West and Bühler 149, 150, 154, 157, Q. 2.

(2) Stokes' Hindu Law, Mayukha, pl. 18, chap. 4, sec. 8.

(3) 8 Bom. H. C. Rep. 244 O. C. J.

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and the like.[1] The interpretation of Manu's text accepted in the Bengal school, viz., that women are excluded from inheritance, is clearly not the construction accepted in the western schools. This is best shown by the way in which the lists of heirs are given both in the Mayukha and the Mitakshara, including great-grandmothers and sisters, neither of whom are expressly mentioned in Manu, and they are mentioned in the books of the western schools, not as exceptions from, but as illustrations of, a general rule.[2] It is an error to suppose that the incapacity of females to inherit is anywhere laid down in the text of Manu. He lays down that females are not independent, and states certain restrictions on the use of property by females, but none on their capacity to inherit. Whatever the correct interpretation of the text of Manu may be, the question for the Court now to consider is—How has Manu been interpreted in the Mayukha and the Mitakshara? The passages relied on by the other side, as being explanations why certain females are to inherit, are rather explanations of the passages in Manu which might, at first sight, appear to deny the right of those females to inherit.[3] No doubt there was a certain confusion which gave rise to two general doctrines, one adopted by the Bengal and Madras lawyers, that women do not inherit; the other that they do, adopted by lawyers of the western school. Unless there is something to show that women under the western school do not inherit, it lies on the other side to show that they do not, and not on us to show that they do; and so it becomes important to consider what interpretation has been put upon the word *gentiles* by western lawyers, whether, that is, they include in it females as well as males. As to the argument that Nilakantha by mentioning the sister could not have meant to include those born into a family by marriage, it is negatived by the words "among these" occurring in the same context.[4]

Lakshmibái v. *Jayrám Hari*[5] is not illogical. According to the Mitakshara, widows in the ascending line take before their husbands on the ground that the soil is preferable to the seed; but

(1) Stokes' Hindu Law, Mayukha, chap. 4, sec. 10, pl. 7.

(2) Stokes' Hindu Law, Mitakshara, chap. 2, sec. 5, pl. 1 *et seq.*

(3) Stokes' Hindu Law, Mitakshara, chap. 2, sec. 1.

(4) Stokes' Hindu Law, Vyav. Mayukha, chap. 4, sec. 8, pl. 18.

(5) 6 Bom. H. C. Rep. 152 A. C. J.

this reason fails in the case of collaterals. If, however, females in the ascending line come in as *gotrajas* in right of their marriage, females in a collateral line must do so also, though they do not, for the reason stated, take in preference to their husbands.

Upon the remaining points in the case the following authorities were cited:—*Barrs* v. *Fewkes*, 2 Hem. and Mil. 60; *Dawson* v. *Clarke*, 18 Ves. 254; *Clarke* v. *Hilton*, L. R. 2 Eq. 810; *Prosunno Coomár Ghose* v. *Tarrucnáth Sirkár*, 10 Beng. L. R. 267; *Nobin Chunder* v. *Issur Chunder*, 9 Calc. W. R. 505; *Beckford* v. *Wade*, 17 Ves. 97; *Collard* v. *Hare*, 2 R. and M. 675; *Cholmondeley* v. *Clinton*, 2 Jac. and W. 190; *in re Peats' trusts*, L. R. 7 Eq. 302.

Cur. adv. vult.

WESTROPP, C.J.:—The material facts of this case are the following:—

Mulji Nandlál, a Hindu of the Vániá caste, died, on the 5th of January 1840, possessed of considerable moveable and immoveable property. The latter, with the single exception of a house and premises situate at Jambusir, in Guzerat, lay in the island of Bombay. He left no male issue, but his widow Sarasvatibái and his daughter Jethibái (called, in his will, Ben Jethi) survived him. By that will, which was written in the Guzerathi language and character, and was dated the 2nd of January 1840, he appointed Gangádás Vizbhukandás and Trikamlál Avechuldás his executors. More translations than one of it have been put in evidence. We take the best of these translations as our guide to the contents of the will, namely, that made by our present chief translator, Mr. Flynn, on the 2nd September 1874. The appointment of Gangádás Vizbhukandás and Trikamlál Avechuldás as executors was made thus:—

"To Sháh Gangádás Vizbhukandás and Sháh Trikamlál Avechuldás. Written by Sháh Mulji Nandlál. To wit: the cause of (this) being written, is as follows:—At present my body is in a sickly state. Therefore I have made this will. Now, in the event of my decease, I have given you my absolute full 'power' as follows:—As to whatever 'estate' there is belonging to me, and whatever property there may be belonging to me, 'power' (over) the whole thereof and all my claims and debts is given to

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you two persons. Therefore, in the event of my decease, do you be pleased to take (the same), and after me (you are) to make the outlays, and (are) to give according to what I have written. Do you be pleased to do all that. The particulars thereof are written below." The testator then proceeded to specify various legacies to Maharajas of his caste, to temples, and to private individuals, and outlays to be made for his funeral obsequies. The words "power" and "estate," above mentioned, are introduced in English words, but in Guzerathi characters, into the Guzerathi vernacular —a common practice with respect to these words amongst the natives of this island. Mr. Flynn, in the margin of his translation, notes that the English word "power" which is used in the text, generally signifies, when employed by natives, the power given by a testator to his executor. We may add that it is very frequently used here in Guzerathi and Marathi documents to signify also the actual probate or letters of administration.

After directing the executors to give certain gold ornaments to his brother's wife, Jadow Váhoo, the will proceeded thus:—

"Item.—Should the said party, namely, the Bái (lady, *i.e.*, Jadow Váhoo), live together with (my wife) in the house, (it will be) well. And in case she should not live with (her), then Rs. 1,001, namely, one thousand and one, are to be deposited at interest in a good place; and out of the interest that may be received in respect thereof, she is to eat (her) bread as long as she may live."

"To my wife Sarasvati Váhoo, do you be pleased to give ornaments (worth) Rs. 3,500, and these ornaments (she shall have as long as she may wear them). And afterwards those ornaments are to be sold, and the money (realized thereby) is to be deposited in some good place, and should she not agree to live with my brother's wife, and should she live apart, then out of the interest which may be received for the said money which may be deposited in another place, she is to eat (her) bread or go on a pilgrimage, should she wish to go."

"To my daughter Ben Jethi do you be pleased to give (as follows):—The particulars thereof (are as below). The ornaments I have made for (the use of) my house are with Ben Jethi. The same I have given to Ben Jethi. And, in the event of her decease, do you be pleased to dispose of the same as you may deem proper."

"There is my house situated in Sootarchawl. The rent which may be received for the same, Ben Jethi may appropriate; and (but) the said house cannot be sold by her."

"Item.—There is my one godown situate at Chinch Bandar. With the rent which may be received for the same, do you be pleased always to give after me (*i.e.*, after my decease) daily alms."

"As to the one house (known as that of Jhara Vasûdev) in which I live, in one story of the same my wife and my brother's wife shall live. The whole of the rest is to be let, and should my wife and my brother's wife (living) together not agree, then they may live separately in the said story, and act in accordance with the respectability of my house. And, should they live together, do you be pleased to pay Rs. 301, namely, three hundred and one, per one year, for (their) expenses."

"In this way I have given in writing to you. Now, in the event of my decease [you are] to give in accordance with what I have written, and are to make outlays. And there are my three (sailing) vessels, and there is a house at Jambusir. All the authority appertaining to the same is yours. And there are my account books. Having examined all the claims and debts (entered) therein, the outlays and the payments are duly to be made in proportion to what may be realized of those (claims). Anything you may see fit (to do) besides what I have written (to be done), you in that case are duly to do accordingly. This document I have given in writing of my free will and pleasure and in sound mind, having read (it) and become informed (of its contents). It is agreed to by me and my heirs and representatives and my heiress. In the year 1896, Magsar Vad 13th, the day of the week Thursday, the English date the 2nd January 1840." Then followed the signatures of the testator and four attesting witnesses. The will gives authority to the executors in that capacity over the whole of his property, but specifies in detail only a part of it.

There is not any evidence to show that either Sarasvatibái, the wife of the testator, or Jethibái, his daughter, was present at the execution of the will, or concurred in it. The petition of the

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executors filed on the 26th February 1841, praying that probate should be granted to them, and the affidavit (made on the 25th February 1841) of one of the attesting witnesses to the execution of the will, stated that the testator's wife, Sarasvatibái, was of the age of fifteen years, and Jethibái of the age of seventeen years at the time of his decease, and that the latter was the testator's daughter by a former wife, Ladkubái, and was married to Haridás Kásidás.

Probate issued forth of the Supreme Court on its Ecclesiastical Side to the executors Gangádás Vizbhukandás and Trikamlál Avechuldás, on the 13th of April 1841, in the ordinary form, and not as executors according to the tenor; and they entered into possession of the property of the testator, Mulji Nandlál. Trikamlál Avechuldás died in February 1842. He was the son of Pránkuvarbái, a sister of Mulji Nandlál. She had died in 1840. Trikamlál left surviving him a son, named Bháishet. Trikamlál, as a sister's son, could only have claimed to inherit from Mulji Nandlál as a *bandhu*, and, therefore, could not successfully compete with the plaintiff Lallubhái and his brother Mulchand, who were *gotraja-sapindas* of Mulji Nandlál, still less could Bháishet do so. The plaint alleged that, "after the death of Trikamlál Avechuldás, the said Gangádás Vizbhukandás entered into *exclusive possession* of the personal estate and receipts of the rents and profits of the real estate of the said testator to an amount much more than sufficient to pay the funeral and testamentary expenses and debts of the said testator, and the pecuniary legacies bequeathed by him."

Some stress has been laid on the employment, by the plaintiff, of the phrase "exclusive possession" as amounting, it was argued, to an admission that the possession of Gangádás was, from the death of Trikamlál, adverse to the widow and daughter of the testator and to the present plaintiffs. But we think that the phrase has been used merely in antithesis to the previously stated joint possession of both executors, and cannot be regarded as admitting or averring that the possession of Gangádás was anything more than that of an executor.

Jethibái died in May 1841 without issue, but leaving her husband surviving her.

On the 5th July 1843, Gangádás filed, in the Supreme Court, an inventory of personal property of Lulji Nandlál, and did not mention in it his immoveable property, or the rents and profits thereof.

The plaint stated that Gangádás paid to Sarasvatibái a monthly allowance of about Rs. 25 "for her maintenance."

He died on the 29th of May 1861 without male issue, but leaving surviving him his widow Mánkuvarbái and three daughters. Mulji Nandlál's widow, Sarasvatibai, who also survived Gangádás, died, as the plaint alleged, intestate, and, admittedly, without issue, on the 20th March 1862. Gangádás had continued, down to the time of his decease, in possession of the estate of Mulji Nandlál. By his will of the 8th July 1860, Gangádás had appointed his wife to be his sole executrix. She obtained probate of that will on the 21st August 1861, and entered into possession as well of her husband's estate, which was considerable, as of that of Mulji Nandlál. The allegation in the plaint is that Mánkuvarbái "thereupon entered into possession of so much of the personal estate of the said Mulji Nundlál, and into the receipt of the rents and profits of so much of his real estate as had been held by her said husband (Gangádás) up to the time of his death."

In her written statement in defence to this suit she said:—

"4. After the death, in May 1841, of the said Jethibái, intestate and without issue, the house, and jewels given to her by the will of the said Mulji Nandlál reverted to his estate, and possession thereof was resumed by his executors."

"5. After the death, in February 1842, of the said Trikamlál Avechuldás, the said Gangádás Vizbhukandás had sole possession and *management* of the estate and effects left by the said Mulji Nandlál, so far as the same had not been disposed of by his said will, or applied to the purposes therein directed, and, after the death, on the 29th May 1861, of the said Gangádás Vizbhukandás, this defendant, his widow and executrix, has had sole possession and administration of the same."

"6. This defendant has been informed that the said Sarasvatibái, before her death in the month of March 1862, executed a document purporting to be her last will, and thereby gave her

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state and effects to the said Bháishet Trikamlál; but the said will has not, this defendant believes, been either proved or otherwise established."

"7. It being at one time supposed that the said Haridás Kásidás, the surviving husband of the said Jethibái, was, as his heir or otherwise, entitled to the residuary estate of the said Mulji Nandlál, or to some interest therein, an assignment of his right, title, and interest, (if any,) in such estate was on the 26th June 1863 made by him for valuable consideration to the said Bháishet Trikamlál."

"8. On the 7th of January 1864, the said Bháishet Trikamlál released to this defendant, for valuable consideration, all rights, claims, and demands whatsoever against this defendant relating to or against the estate of the said Mulji Nandlál."

In her evidence Mánkuvarbái said that, although the consideration in the indenture of release was stated to be Rs. 5, she had, in fact, paid Rs. 51,000 to Bháishet Trikamlál for his execution of it, which sum was first paid to him in cash and then entered as a provision for his family, he being in embarrassed circumstances, to his wife's credit in the books of the firm of Gangádás Vizbhukandás, which was still carried on in his name.

Subsequently to the death of Gangádás, one Lallubhái Nathubhái (a more distant male relative of Mulji Nandlál than the present plaintiffs) instituted a suit against Mánkuvarbái in December 1862, claiming the estate of Mulji Nandlál, but he eventually withdrew that suit.

Upon the 13th of August 1870, Lallubhái Bápubhái filed his plaint in the present suit against Mánkuvarbái as widow and executrix of Gangádás, who was surviving executor of Mulji Nandlál. The plaint was, in April 1871, amended by adding as a plaintiff Kásidás Mulchand, who is son of Mulchand Bápubhái (plaintiff Lallubhái's brother), who survived Gangádás, and at Mánkuvarbái's request, as she in her evidence admits, performed the funeral ceremonies of Gangádás. Mulchand Bápubhái died before the plaint in this was filed. The plaint was further amended in November 1871 by adding Bháishet Trikamlál, Jaikisandás Gangádás, Kásibái, wife of Vithuldás Jaganáth, and Diválibái, wife of Jethá

bhái Khusháldás, as defendants, and in April 1872 by adding Rámdás Jogmohandás and Mánikji Dhanjibhái as plaintiffs. Bháishet Trikamlál was added as a party in consequence of Mánkuvarbái having, in her said written statement in July 1871, objected that he ought to be made a party, which objection, however, was improper, for her allegation (and subsequent proof) that he had executed, in her favour, the release already mentioned, showed that it was quite unnecessary to make him a party. Upon her objection, also, Jaikisandás (an infant of six years of age at that time) was made a party, she alleging that she had, in February 1868, duly adopted him as son to her deceased husband Gangádás. Diválibái is the surviving daughter of Gangádás by his first wife; Kásibái is his surviving daughter by his second wife, the defendant Mánkuvarbái, and is natural mother of Jaikisandás by her husband Vithuldás Jaganáth.

The reason for making Rámdás Jagmohandás and Manikji Dhanjibhái parties as plaintiffs, was that they purchased the whole of the alleged interest of the plaintiff Lallubhái Bápubhái, and part of the alleged interest of the plaintiff Kásidás Mulchand, in the estate of Mulji Nandlál.

The plaint alleged that the residue of Mulji Nandlál's estate was left undisposed of by his will, and that, in the events which happened, Sarasvatibái, his widow, became beneficially entitled thereto, and that on her death, intestate and without issue, it passed, according to the Hindu law, to the nearest male heirs of Mulji Nandlál, which it alleged that the plaintiffs Lallubhái and Kásidás were. It prayed the establishment of the will of Mulji Nandlál, and that its trusts should be carried into execution, that an account might be taken of his personal estate and the rents, profits, and produce of real estate which may have come into the possession of Gangádás Vizbhukandás and of the defendant Mánkuvarbái; also, if necessary, an account of the funeral and testamentary expenses, debts, and legacies of Mulji Nandlál, and that the balance of his estate and effects remaining unapplied, and any balance found due from her, may be applied in due course of administration, and the clear residue ascertained and paid over to the plaintiffs.

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Mánkuvarbái, by her written statement already mentioned, submitted that either she or Jaikisandás, in virtue of his adoption by her, was beneficially entitled to the undisposed of residue of the estate of Mulji Nandlál.

Diválibái and Kásibái, in their written statements, admitted the priority of the claims of Mánkuvarbái and Jaikisandás, but alleged that, in default of the adoption of the latter, or subject to his rights, they would be, on the death of Mánkuvárbái, entitled to the residue of the estate of Mulji Nandlál in preference to the plaintiffs.

Jaikisandás, by the written statement filed on his behalf by Mánkuvarbái, as his guardian *ad litem*, claimed, by virtue of his adoption as son of Gangádás, to be heir of Mulji Nandlál, and as such entitled to his undisposed of estate. The issues originally framed were:—

1. Whether this suit is barred by the provisions of Act XIV of 1859, an Act to provide for the Limitation of Suits.

2. Whether the plaintiffs Lallubhái Bápubhái and Kásidás Mulchand are the nearest heirs of Mulji Nandlál according to Hindu law.

3. Whether the plaintiffs are entitled to the relief prayed, or any part thereof.

4. Whether the defendant Jaikisandás Gangádás was lawfully adopted as the son of Gangádás Vizbhukandás.

5. Whether, as such adopted son, the said Jaikisandás Gangádás is not a nearer heir to the said Mulji Nandlál than the plaintiffs, or either of them.

6. Whether, in the event of Jaikisandás Gangádás not having been validly adopted, the defendants Kásibái and Diváli are not nearer heirs to the said Mulji Nandlál than the plaintiffs, or either of them.

7. In the event of the fourth issue being found in the affirmative, whether the adoption of the said Gangádás Vizbhukandás has not been revoked.

Immediately after the settlement of issues, Diválibái and Kásibái at the request of their counsel and with the consent of

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the plaintiffs' counsel, were dismissed by Mr. Justice Bayley from this suit, with costs to be paid by the plaintiffs.

At the hearing of the cause before Mr. Justice Bayley, he, following, but not expressing any opinion upon, *Lakshmibái* v. *Jayrám Hari*,[1] found the second and third of the above issues in the negative and for the defendant Mánkuvarbái, *i.e.*, that the plaintiffs Lallubhái Bápubhái and Kásidás Mulchand are not the nearest heirs of Mulji Nandlál according to Hindu law, and that they, therefore, are not entitled to the relief prayed by their plaint, or any part thereof. Upon the other issues he did not arrive at any finding. He made a decree with costs for the defendants other than Diválibái and Kásibái, previously dismissed from the suit as already mentioned.

The plaintiffs having appealed against that decree, the Appellate Court ordered "that it be referred to the Division Court, to try the following issues, and return its finding thereon, together with the evidence, to this Court :—

"1. Whether this suit, or any part thereof, is barred by the Law of Limitation.

"2. Whether the defendant Jaikisandás Gángadás was duly adopted by the defendant Mánkuvarbái as son to her deceased husband Gangádás Vizbhukandás, and if so, when ?

"3. If there has been any such valid adoption as aforesaid, whether, having regard to the will of Mulji Nandlál, or independently thereof, the defendant Jaikisandás is entitled to the moveable and immoveable estate of Mulji Nandlál, deceased, or either of the same, or any and what part thereof.

"4. If there has been any such valid adoption of the defendant Jaikisandás as aforesaid, whether the plaintiffs Lallubhái Bápubhái and Kásidás Mulchand were, or either of them was, at the decease of Sarasvatibái, widow of the said Mulji Nandlál, entitled to the moveable and immoveable estate of the said Mulji Nandlál, or either of the same, or any and what part thereof.

"5. If there has not been any such valid adoption of the defendant Jaikisandás as aforesaid, whether the plaintiffs Lallubhái

(1) 6 Bom. H. C. Rep. 152.

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Bápubhái and Kásidás Mulchand were, or either of them was, at the decease of the said Sarasvatibái, entitled to the moveable and immoveable estate of the said Mulji Nandlál, or either of the same, or any and what part thereof." And the Appellate Court further ordered "that, in determining the said issues, regard be had to the fact that the defendants Kásibái and Diválibái have been dismissed as parties from this suit with the consent of all parties thereto, and have thereby waived any claim to share in the estate, moveable or immoveable, of Mulji Nandlál, and also to the fact that the defendant Mánkuvarbái by her counsel waives any claim to the said estate as assignee from Bháishet Trikamlál, and relies solely on her claim as widow of Gángadás Vizbhukandás under the will of Mulji Nandlál, and also as his heir, and this Appellate Court doth reserve further directions and costs."

The waiver (which is mentioned in that order), by Mánkuvarbái's counsel, of claim through Bháishet took place in the Appellate Court before Mr. Justice Melvill and myself.

In April 1874 Mr. Justice Bayley came to the following findings :—

On the first of the new issues he found that this suit is not barred by the Law of Limitation.

On the second of those issues he found that Jaikisandás Gangádás, not having been given in adoption by his father Vithuldás Jaganáth (who is still living), or with his consent, was not duly adopted as son to Gangádás (*Náráyan Bábáji* v. *Náná Mánohár*[1]).

This finding on the second issue rendered any finding on the third and fourth issues unnecessary, and accordingly he arrived at none.

The fifth of the new issues he, dissenting from the ruling in *Lakshmibái* v. *Jayrám Hari*,[2] found in the affirmative, thus: "That the plaintiff Lallubhái Bápubhái and Mulchand Bápubhái (the father of the plaintiff Kásidás Mulchand) were, at the decease of Sarasvatibái, entitled to the moveable and immoveable

(1) 7 Bom. H. C. Rep. 153 A. C. J. (2) 6 Bom. H. C. Rep. 152 A. C. J.

estate of Mulji Nandlál." For these findings Mr. Justice Bayley states his reasons in an elaborate judgment.

The defendants excepted to the findings of Mr. Justice Bayley on the first, second, and fifth of the new issues.

The case was argued before my brother Sargent and myself upon these exceptions, and generally upon the merits. At an early stage of the argument, the Advocate General (Mr. Scoble), on behalf of Mánkuvarbái, and Mr. Latham, for Jaikisandás, abandoned any attempt to controvert Mr. Justice Bayley's finding, that the alleged adoption of Jaikisandás in February 1868 was invalid. Mr. Latham also stated that, pending this suit, Mánkuvarbái had formally, and with the consent of Vithuldás Jaganáth, the father of Jaikisandás, adopted Jaikisandás as son to Gangádás anew, and Mr. Latham admitted that such latter adoption, having been made *pendente lite*, cannot affect this suit, and was virtually an admission of the invalidity of the alleged adoption in 1868.

There remained the questions as to the limitation of the suit, and as to whether the plaintiffs Lallubhái Bápubhái and Kásidás Mulchand are the heirs of Mulji Nandlál. These and the question whether the executors took for their own benefit, under his will, the residue of his property, were argued for several days before my brother Sargent and myself at considerable length and with much ability.

Mánkuvarbái has lately died, having previously made a will as the executrix of which her daughter Kásibái has been lately added as a defendant to this suit.

Whatsoever may be the effect of the Hindu Wills' Act (XXI of 1870) and the application—to the wills of Hindus, of section 179 of the Indian Succession Act (X of 1865), upon the position of the executor of a Hindu, this case is quite untouched by those Acts—the execution of the will of Mulji Nandlál, the time of his death, and the grant of probate to his executors, all being anterior to the 1st of September 1870, when Act XXI of 1870 came into force.

There is not any evidence as to whether the moveable or immoveable estate of Mulji Nandlál was ancestral or self-acquired.

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There is not any precedent, of which we know, for applying to the wills of Hindus the rule of the common law in England, that the undisposed of residue of personal estate vests in the executors beneficially. There are many reasons for not applying that rule to Hindus, and we are not at all disposed to make a precedent in favour of it. In *Mapp* v. *Elcock*[1] Lord Cottenham said: "It must be borne in mind that the title of an executor to personalty not otherwise disposed of, did not arise from any gift of the testator, but from the operation of law incident to the office. The law vested the property in the executor, and if the testator had not directly or indirectly declared any purpose to which he has to apply it, there was nothing to interfere with the legal title of the executor, and he, therefore, retained such property for his own benefit; but this result being, as was supposed, generally unforeseen, and not intended by the testator, equity considered many circumstances as indicative of an intention contrary to the claim, and when they were found in the will, declared the executor trustee for the next-of-kin, and among these was any expression showing that the executor was intended to hold the property upon trust; and when such intention sufficiently appeared, there could not be a more conclusive reason against the claim of the executor, whose title, depending on there being no trust, was necessarily negatived by the testator's declaration that there was to be a trust."

Setting aside the Hindu Wills' Act of 1870, as to the effect of which we give no opinion,[2] the reason given by Lord Cottenham in that case for the title of an executor in England to personalty, viz., that it is derived not from any gift of the testator, but from the operation of law incident to the office, does not exist in the case of the executor of a Hindu. Although the testamentary power and the right to appoint an executor has been recognized in all three presidencies as belonging to Hindus, that power and right have been regarded as subject to Hindu law and usage.

In *Mussumat Bhoobun Moyee Debiá* v. *Rám Kishore Acharj Chowdhry*[3] in the Privy Council, Lord Kingsdown, in giving judgment, said: "There is no doubt that, by the decision of

(1) 2 Phil. 793, at p. 796. (2) See 8 Beng. L. R. 208, 220.

(3) 10 Moo. Ind. App. p. 279; see p. 308.

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Courts of Justice, the testamentary power of disposition by Hindus has been established within the Presidency of *Bengal*; but it would be to apply a very false and mischievous principle if it were held that the nature and extent of such power can be governed by any analogy to the law of *England*. Our system is one of the most artificial character, founded, in a great degree, on feudal rules, regulated by Acts of Parliament, and adjusted by a long course of judicial determinations to the wants of a state of society differing, as far as possible, from that which prevails amongst Hindus in *India*."

The Courts in this country have regarded an executor under the will of a Hindu as possessing a power inferior to that of an executor in England.

In *Sreemutty Dossee* v. *Tarachurn Coondoo Chowdry*(1) Peacock, C.J., said: "We are also of opinion that, under the will of *Rájmohun Roy*, *Doorgápersad* had no right to create the mortgage; and although he became the attorney, or executor, under the will of *Rájmohun Roy*, he had not, according to the Hindu law, the same power over the moveable and immoveable estate of *Rájmohun* which an executor would have over leasehold estate according to English law. We think that, according to the Hindu law, an attorney or executor under a will has no greater power over immoveable estate than a manager who, according to the decision of the Privy Council in the case of *Honoomanpersaud Panday* v. *Mussumut Bábooee Munraj Koomeree*(2) has only a limited and qualified power; and, further, we are of opinion that the general power of a manager under a will may be restricted by the will, and that the manager is bound to act according to the directions in the will."

In *Srimati Jaykali Debi* v. *Shibnáth Chatterjee*,(3) Phear, J., in giving judgment, said: "I suppose it is now clear that probate

(1) Bourke's Reports, Part VII, p. 50. See also *Lálchand Rámdyál* v. *Gumtibái* (8 Bom. H. C. Rep. 140, 144 to 151 O. C. J.) And *In the goods of Sumboochunder Mitter* (1 Taylor and Bell, 39-40) and *Mohar Ranee Essadah* v. *The East India Company* (1 Taylor and Bell, 290) as to the power of the administrator of a Hindu's estate. It may be well to mention what does not appear with sufficient distinctness in the report of *Lálchand Rámdyál* v. *Gumtibái*, that not only the attachments, but also the issuing of letters of administration to the Administrator General in that case, all occurred previously to the coming into force of Act XXI of 1870.

(2) 6 Moo. Ind. App. 393.

(3) 2 Beng. L. R. O. J., page i.

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does not confer upon the executor of a Hindu will any personal rights of property analogous in any way to an English estate or interest. The will gives him just such powers of dealing with the property comprehended in it as its words express, and no more. Beyond the scope of the will, and so far as he is not constructively restricted by its directions, it may be that he has the powers which are implied in the bare authority of a manager during minority; but these are all he can claim. At any rate, this doctrine seems to have been laid down with regard to immoveable property in the case of *Sreemutty Dossee* v. *Tarachurn Coondoo Chowdry*,(1) by which I readily admit myself bound to be guided. It follows that a stranger would not be allowed with impunity to take immoveable property from an executor, unless he could show that he had previously satisfied himself, by reasonable inquiry, that the alienation was justified either by the directions to be found in the will, or by the exigencies of the estate (see *Honoomanpersaud Panday* v. *Mussumut Bábooee Munraj Koomeree*(2)). Now, I apprehend that moveable property is, without doubt, according to Hindu law, in the same predicament as immoveable property."

It seems to my brother Sargent and myself that we should be acting in a manner contrary to the spirit, if not also to the letter, of the Charter of the Supreme Court, which reserves to Hindus(3) their law of inheritance and succession, if we were to apply to them the English common law rule that an executor shall take beneficially the residue as to which a Hindu testator may have died intestate. That reservation was continued by section 18 of the High Court's Charter of 1862 and section 19 of its Charter of 1865.

It has, however, been further contended on behalf of the defendants that the will of Mulji Nandlál indicates his intention that the executors should take the residue beneficially.

The mode of construction applicable to the wills of Hindus has been laid down by the highest authority.

(1) Bourke, Part VII., 48. (2) 6 Moo. Ind. App. 393.

(3) *Sub nomine* "Gentús," as to the scope of which term see *Lopes* v. *Lopes*, 5 Bom H. C. Rep. pp. 183 to 186, O. C. J.; *Bhagvandás Tejmál* v. *Ráimál* 10 Bom. H. C. Rep. 241 at p. 259.

In *Sreemutty Soorjeemoney Dassee* v. *Denobundoo Mullick*(1) Lord Justice Turner, in giving the judgment of the Privy Council, said: "In determining that construction, what we must look to is the intention of the testator. The Hindu law, no less than the English law, points to the intention as the element by which we are to be guided in determining the effect of a testamentary disposition; nor, so far as we are aware, is there any difference between the one law and the other as to the materials from which the intention is to be collected. Primarily, the words of the will are to be considered. They convey the expression of the testator's wishes; but the meaning to be attached to them may be affected by surrounding circumstances, and where this is the case those circumstances, no doubt, must be regarded. Amongst the circumstances thus to be regarded is the law of the country under which the will is made, and its dispositions are to be carried out. If that law has attached to particular words a particular meaning, or to a particular disposition a particular effect, it must be assumed that the testator, in the dispositions which he has made, had regard to that meaning or to that effect, unless the language of the will or the surrounding circumstances displace that assumption."

The will of Mulji Nandlál opens with what is a common mode in the wills of natives of this island, of appointing executors. We have already mentioned that the English word 'power' is amongst them a familiar and, indeed, the most ordinary phrase for denoting the authority of an executor or administrator, and is also a well-known equivalent for probate or letters of administration. Next in the will follow a number of legacies, which are to be paid, and trusts, which are to be performed, including trusts for the benefit of his sister-in-law, his wife, and his daughter. As, on the one hand, the word 'trust' does not invariably create a trust, so, on the other hand, trust may be created without the employment of that word: *The Commissioners of Charitable Donations and Bequests* v. *Wybrants*.(2) The special benefits which the testator conferred by the will on his wife and daughter have been relied upon as showing that he did not intend that either of them should have

(1) 6 Moo. Ind. App. 526, 550. (2) 2 J. & L. 182.

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the general residue of his estate. Even, however, in England, where there is a devise upon trusts which do not exhaust the property devised, the mere conferring of a legacy, or other benefit, upon the heir does not prevent there being a resulting trust of the residue for him, unless there be other circumstances sufficiently strong to turn the scale in favour of the devisee: *Starkey* v. *Brooks*,(1) *Rendall* v. *Bookey*,(2) *Hopkins* v. *Hopkins*,(3) *Salter* v. *Cavanagh*.(4) On the same principle the mere gift, by a testator, of an annuity to his wife has been held not to be sufficient without other circumstances demonstrative of his intention that she should not have both it and dower to induce the Courts in England to put her to her election between the annuity and dower: *Pitts* v. *Snowdon*,(5) *Pearson* v. *Pearson*,(6) *Foster* v. *Cooke*,(7) *Greatorex* v. *Carey*,(8) *Hill* v. *Hemsworth*,(9) *Norcott* v. *Gordon*,(10) *Holdich* v. *Holdich*,(11) *Gibson* v. *Gibson*,(12) *French* v. *Davis*.(13) Those cases show that the intention to exclude her dower must be clear. Even where there is an expressed intention to exclude the next-of-kin from the residue of personalty, or the heir from the residue of realty, there must be a distinct devise away from them; otherwise there will be a resulting trust in their favour: *Fitch* v. *Weber*,(14) *Johnson* v. *Johnson*.(15) The words in the will of Mulji Nandlál following the nomination of executors—"Do you be pleased to take the same"—will, having regard to the passages immediately preceding and following those words, be most appropriately interpreted by construing them as meaning that the executors should take the property into their possession for the purpose of managing it in accordance with the directions of the will, and *in usum jus habentium*.

The form is not an uncommon one here, amongst Hindus, in wills appointing executors, and has not been understood as inconsistent with the vesting of the property in the heir, subject, however, to the management of it by the executors conformably to the will when the testator is so circumstanced as to have testa-

(1) 1 P. Wms. 390. (2) 2 Vern. 425 S. C. Prec. Chan. 162.
(3) Cas. temp. Talbot 44. (4) 1 Drury and Walsh 668. (5) 1 Bro. C. C. 292.
(6) 1 Bro. C. C. 291. (7) 3 Bro. C. C. 347. (8) 6 Ves. 615.
(9) Ll. & G. (temp. Plunket) 87. (10) 14 Sim. 258.
(11) 2 Y. & Col. C. C. 18. (12) 1 Drew 42. (13) 2 Ves. Jun. 576.
(14) 6 Hare 145. (15) 4 Beavan 318.

mentary power over the property. The strongest words in the will in favour of the executors are used in relation to the ornaments of his daughter—"and, in the event of her decease, do you be pleased to dispose of the same as you may deem proper." These words, however, are limited to the ornaments. It is not, however, very clear whether the immediately previous passage should not be regarded as an absolute gift of the ornaments to her. The words under consideration which follow the gift to her may very well mean that, if she have not disposed of them in her life-time, the executors may either retain them as part of the trust estate, or realize their value by sale for the benefit of the estate. Having regard to the whole of the will, we do not think that there was any intention to give to the executors a beneficial interest in those ornaments. After providing for apartments for his wife and sister-in-law in the house in which the testator lived, why should he direct that the rest of that house should be let? If he intended that the executors should have taken a beneficial interest in the residue of his property, such a direction would have been superfluous. He might in that case have left it to their discretion to let the rest of the house or not. Again, in speaking of the three sailing vessels and the house at Jambusir, he does not devise them to the executors, but speaks only of all the authority being that of the executors. That must be understood to mean authority as managers of his estate. He next refers to his account books, and directs that, after examination of the debits and credits therein, the outlays and payments (meaning those thereinbefore directed) should be made in proportion to what might be realized after examination of the claims (*i.e.*, credits) and debts therein. Then comes the direction, on which much argument has been expended: "Anything you may see fit [to do] besides what I have written [to be done] you in that case are duly to do accordingly." We think it perfectly impossible to construe that direction into a residuary devise for the benefit of the executors. It must be taken with what immediately precedes it. It certainly is not in the language of gift, and seems to us to mean nothing more than a desire on the part of the testator that the executors should have a large discretion in the management of the estate. There is not in this will, after providing for the trusts, any such clear, unmistakeable devise of the residue to the

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executors by name as there was in the recent case of *Williams* v. *Arkle*,[1] or as there was to the testator's wife and executrix in *Prosunno Coomár Ghose* v. *Tarrucknáth*[2] which can be brought in aid of other indications to show that the intention was that the executors should take the residue beneficially. Disherison is not to be laboriously spelt out of a will. The intention to disinherit must be clear.

The surrounding circumstances in which the testator was placed do not encourage the supposition that he intended to give the residue of his estate to the executors for their own benefit. No doubt he states that he was ill when making this testamentary disposition; but he does not say, nor is there any evidence that he believed himself then to be sick unto death.

His wife, Sarasvatibái, would, in the absence of a son, have been his heir, and if she had died without children or without having adopted a son for him, his daughter, Jethibái, would have been his heir. They were both young, and there does not appear to have been then any reason for supposing that they might not have children. It is not probable that the testator would have preferred a cousin, such as Gangádás, or a sister's son, such as Trikamlál, to a daughter or a daughter's son. If, however, the testator had intended to disinherit his wife and his daughter and their possible issue, he would most probably have left his estate exclusively to Gangádás, his nearest male heir, and not to him and Trikamlál. The union of both names indicates executorship only. He makes no distinction between them as to shares, as he probably would have done had he intended them to take beneficially. Again, he does not intimate in his will any disapprobation of the adoption of a son to him by Sarasvatibái, which, by the law of this Presidency, was a course open for her to pursue, unless he refused to adopt or prohibited her from adopting. Such adoptions by widows, after the decease of their husbands, are matters, in this Presidency, of frequent occurrence.[3]

The next point is whether this suit is barred by Act XIV of 1859, so far as regards immoveable property by section 1, clause 12, and as

(1) 7 Eng. & Ir. Appeals 606. (2) 10 Beng. L. R. 267.

(3) 5 Bom. H. C. R. 181 A. C. J.; 7 *Ibid.* 153, 171, 172 A. C. J. and Appx. pp. i, xvi, xvii.

to moveable property by section 1, clause 16. It has been already stated that we do not think that the 6th paragraph of the plaint, as contended on behalf of the defendants, admits any adverse possession in Gangádás. The passages which have been read from the written statement of Mánkuvarbái, so far from pleading any adverse possession on his or her part, rather indicate the contrary. The term "sole possession," used in the 5th paragraph, does not imply adverse possession, and the terms "management" and "administration" in the same paragraph savour of executorship. The compromises mentioned in the 6th, 7th, and 8th paragraphs, and especially Mánkuvarbái's transaction with Bháishet, show that she could not have supposed that the possession of Gangádás was adverse. The filing by him of the inventory in the Supreme Court in July 1843, subsequently to the deaths of Jethibái and Trikamlál, shows that he regarded himself as executor and not adverse holder. Mánkuvarbái must, by means of her books and papers, have been able to show whether Gangádás mixed the accounts of Mulji Nandlál's estate with those of his own property, and treated it as his own. She has neither alleged nor proved that he did so, and it is a most important fact that Gangádás in his own will, made in July 1860, at a distance of 20 years from the death of Mulji Nandlál, does not mention or affect to deal with any of the property of Mulji Nandlál.

Pelley v. *Bascombe*,[1] affirmed on appeal,[2] is a stronger case than this; for there the will, appointing James Bascombe executor, had never been proved, and the exclusive possession of the executor and, after his death, of his executrix had endured from 1833 to 1860; yet the Court held that the possession, which in its commencement was fiduciary in character, never became adverse—Stuart, V.C., saying: "According to my impression of the law on this subject there ought to be nothing equivocal in a possession which is relied upon as a bar." The Courts are loth to convert a possession which commenced lawfully into a wrongful and adverse possession. See the observations of Wood, V.C., in *Thomas* v. *Thomas*,[3] where he said that "possession is never considered

(1) 33 L. J. (N. S.) Ch. 100. (2) 34 L. J. (N. S.) Ch. 233.
(3) 2 Kay & J. 79; see pp. 83, 84.

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adverse if it can be referred to a lawful title," and *Doe d. Milner* v *Brightwen*[1] which he mentioned.

We agree with Mr. Justice Bayley in thinking that, up to the death of Gangádás in 1861, there had not been any adverse possession. We think, too, that Mánkuvarbái, as executrix of Gangádás, entered into possession of Mulji Nandlál's estate in a fiduciary capacity.

It is said that Mánkuvarbái's possession became adverse, at the latest, when she received the hostile notice from Mr. S. Green as solicitor for Sarasvatibái, dated the 13th December 1861, followed up by another similar notice from him of the 20th January 1862, mentioned in the schedule to Mánkuvarbái's written statement and in her evidence or cross-examination; and that more than six years having elapsed since 1861, and before the filing of the plaint in 1870, this suit is barred, so far as regards the moveable property at least.

That point raises the question whether this case falls within section 2 of Act XIV of 1859; or, in other words, is the alleged resulting trust such a trust as is contemplated by that section? The word "express," which occurs in the English Statute 3 & 4 William IV, c. 27, s. 25, is not to be found in this Indian enactment. Cases collected in Mr. Thomson's useful book upon Act XIV of 1859 show that section 2 has been applied to trusts other than express trusts. There have been subsequent unreported (we believe) decisions of this Court to the same effect.

It would seem, however, unnecessary for us to inquire whether that section has in that respect been rightly construed; for, if *Salter* v. *Cavanagh*,[2] which occurred in 1838, were correctly decided, as we think it was, the resulting trust in the present case arising on the will of Mulji Nandlál, subsequently to the trusts specified in it, should be regarded as an express trust as respects both the moveable and immoveable estate. The learned Advocate General (Mr. Scoble) referred to the following remarks of Lord St. Leonards in *The Commissioners of Charitable Donations and Bequests* v. *Wybrants*[3] as betraying some doubt, on his part, of the

(1) 10 East. 583. (2) 1 Dr. & Walsh 668. (3) 2 J. & L. 182.

soundness of *Salter* v. *Cavanagh*[1]:—"In the case of *Salter* v. *Cavanagh* it seems to have been held that an implied trust is an express one within the Act (3 and 4 Wm. IV, c. 27, s. 25), where it arises upon the face of the instrument itself, and is not to be made out by evidence; but upon this point I am not called upon to give any opinion." If that be a doubt, it is a very faint one, and has been more than dispelled by the fact that Lord St. Leonards himself in his subsequently published work on the Real Property Statutes[2] says:—"Although the section under consideration speaks of an express trust, yet a trust may fall within its enactment where the trust is not in words expressly declared. Therefore, where a man is made an express trustee of a term for certain purposes, and is, on the face of the instrument, by the rule of equity, a trustee of the surplus, he is a trustee throughout within this section," and for that proposition he cites in his note *Salter* v. *Cavanagh*.[3] He continues: "What amounts to a sufficient expression of a trust, must depend upon the terms of the instrument and the rules of equity: *Commissioners of Charitable Donations and Bequests* v. *Wybrants*[4] and *Hunt* v. *Bateman*.[5] It certainly is not necessary to use the word 'trust' in order to create an express trust."[6] In *Mapp* v. *Elcock*,[7] already referred to by us upon another point, Lord Cottenham said that "there is, first, a gift of all the real and personal estate to Edward Elcock, his heir, executors, administrators, and assigns to and for the several uses, intents and purposes following: then come several directions as to part of such property, in each of which it is described as held upon trust; and the will concludes with these words: 'Lastly, I nominate and appoint the said Edward Elcock executor of this my last will and testament.' *This is clearly a gift of the whole property in trust, though the trusts declared do not exhaust the whole.*" His Lordship accordingly held the executor to be a trustee for the next-of-kin.[8]

(1) 1 Dr. & Walsh 668.

(2) Page 103 (edn. of 1852).

(3) 1 Dr. & Walsh 668.

(4) 2 Jo. & Lat. 182.

(5) 10 Ir. Eq. Rep. 360.

(6) See 2 Jo. & Lat. at p. 197.

(7) 2 Phillips 799.

(8) See also *Mutlow* v. *Bigg*, L. R. 18 Eq. 246; *Harris* v. *Harris*, 29 Beavan 110.

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We concur with Mr. Justice Bayley in thinking that this suit is not barred by Act XIV of 1859.

The next question is whether, at the time of Sarasvatibái's death, the right to inherit the estate of her deceased husband, Mulji Nandlál, devolved upon the plaintiffs or upon the defendant Mánkuvarbái. The plaintiffs upon the one side and she upon the other allege of themselves, respectively, that they are *gotraja-sapindas* of Mulji Nandlál, and, therefore, under Manu,(1) the Mitakshara,(2) and the Vyavahara Mayukha(3) entitled to his estate. Mánkuvarbái further especially relied upon *Lakshmibái* v. *Jayrám Hari*(4) as conclusive of her right; but the soundness of that decision has been questioned on behalf of the plaintiff and by Mr. Justice Bayley. The text of Manu, referred to, is:—"To the nearest sapinda, male or female, after him in the third degree, the inheritance next belongs; then, on failure of sapindas and of their issue, the samanodaka or distant kinsman shall be the heir," &c. It is highly important to note that two such skilled orientalists as Sir W. Jones and Mr. Colebrooke concur in importing into their translations of that text the words "male or female" from the valuable commentary of Kalluka Bhatta.(5) The passage from the Mitakshara,(6) declaring the order of succession in ch. II, sec. 1, pl. 2, is:—"The wife and the daughters also, both parents, brothers likewise, and their sons, gentiles (*gotrajas*), cognates (*bandhus*), a pupil, and a fellow-student: on failure of the first among these, the next in order is, indeed, heir to the estate of one who departed for heaven, leaving no male issue. This rule extends to all (persons and) classes." The words "persons and," in the last sentence, are obtained by Mr. Colebrooke from the most celebrated commentary on the Mitakshara, viz., the Subodhini of Visvesvára. The text itself is that of

(1) Chap. IX, pl. 187, Cole. Dig., bk. V, ch. VIII, pl. 434.

(2) Ch. II, sec. I, pl. 2, and sec. V, pl 1, 3, 4, 5.

(3) Chap. IV, sec. VIII, pl. 18. (4) 6 Bom. H. C. R. 152 A. C. J.

(5) Manu, ch. IX, pl. 187; Cole. Dig., bk. V, ch. VIII, pl. 434. As to the value of Kalluka Bhatta's commentary, see the preface to Sir W. Jones' translation of Manu, Haughton's edn. of 1825, p. xviii, *nomine* Culluca; Colebrooke's preface to the Digest, vol. I, p. xiv, edn. 1801; *Muranji Gocul-dás* v. *Parvatibái*, Ind. L. R. 1 Bom. 180.

(6) Chap. II, sec. I, pl. 2.

Yajnyavalkya,[1] on whose writings Vijnyanesvara was commenting in the Mitakshara. We shall presently advert to the other portion of the Mitakshara relied upon.

It has not been denied that, according to the law which, under the Mitakshara and Mayukha, prevails in this Presidency, Lallubhái and Mulchand were *gotraja-sapindas* of Mulji Nandlál. The common ancestor of them and of Mulji was Motiláll, who (counting inclusively both him and the *propositus* Mulji) was sixth in ascent from Mulji, and the brothers Lallubhái and Mulchand are (counting inclusively both themselves and Motiláll) seventh in descent from Motiláll. They are, therefore, on the extreme verge of the *sapinda* relationship. Kásidás, the son of Mulchand, is beyond the verge, and can only be regarded as a *samanodaka*; but Mulchand, his father, having survived Sarasvatibái, may be permitted to stand in his place. It is a matter of indifference to the defendants whether he does so or not; as, if he do not, the whole estate would devolve upon the plaintiff Lallubhái, if the latter rank as an heir before Mánkuvarbái. He, however, by associating his nephew with him as a co-plaintiff has admitted his right to a moiety of the residue of Mulji's estate. The real questions are whether Mánkuvarbái, the widow of Gangádás (who was first cousin of Mulji on the paternal side, and, therefore, a much nearer *gotraja-sapinda*[2] of Mulji than Lallubhái and Mulchand) is entitled, as such widow of a paternal first cousin, to be regarded as a *gotraja-sapinda* of Mulji, and if she be so, does she stand next in rank to her husband Gangádás? These, and more especially the latter, are questions of some nicety, and were originally argued before Sir C. Sargent and myself only, but were, at our suggestion, re-argued before us and Mr. Justice West, of whose profound knowledge of Hindu law we were anxious to avail ourselves. It is with the first of those questions that I purpose chiefly to deal. My brother West will state in detail the reasons upon which we ground our conclusion upon the second.

(1) Mr. Colebrooke in his translation of this text of Yajnyavalkya renders "*gotrajas*" as "kinsmen sprung from the same original stock," and "*bandhus*" as "distant kindred." Cole Dig., bk. V, ch. VIII, pl. 398.

(2) Mitak., ch. II, sec. V, pl. 4, paternal uncle's son.

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For the plaintiffs it has been argued that the wives of collateral *gotraja-sapindas*, such as Mánkuvarbái was, are not themselves *gotraja-sapindas*, at this side of India any more than in Bengal or Madras, and that the general rule, here as well as there, is that females, unless named as heirs by special texts, are incompetent to inherit.

Manu, the Mitakshara, and Mayukha are the reigning authorities in this Presidency.(1) In the island of Bombay a general—I do not, however, by any means say a universal—predominance has been given by our predecessors in the Recorder's, Supreme, and High Courts to the Mayukha over the Mitakshara, partly perhaps because they found it more frequently quoted to them than the Mitakshara, partly perhaps because the Mayukha was very much praised and followed in Guzerat—Bombay having formed a part of the ancient kingdom of Guzerat before the cession of the former to the Portuguese,(2) and partly because the Mayukha was the more modern treatise, and might be supposed to embody, to a considerable extent, such variations in usage as had occurred during the long period which intervened between its composition and that of the Mitakshara. The Mayukha is spoken of by Mr. Colebrooke(3) as the work of an eminent writer, having, concurrently with the Mitakshara, considerale weight amongst the Mahrattas, and as amongst those works which "agree in generally deferring to the authority of the Mitakshara, in frequently appealing to its text, and in rarely and at the same time modestly dissenting from its doctrines on particular questions." Mr. Colebrooke, in writing to Sir T. Strange (1 Stra. H. L. 318), observed that "in the west of India, and *particularly among the Mahrattás*, the greatest authority after the Mitakshara is Nilakantha, author of the Vyavahara Mayukha and of other treatises bearing the same title." Mr. Borradaile, the translator of the Vyavahara Mayukha, in his preface to his translation, after mentioning the five schools of Hindu law, observes that "in all but the first (Bengal or Gauriya school), the

(1) See *Pránjivandás* v. *Devkuvarbái*, 1 Bom. H. C. Rep. 131; *Náráyan Bábáji* v. *Náná Manohar*, 7 Bom. H. C. Rep. at p. 166 A. C. J., and Appendix, pp. 6, 10, 11.

(2) See *Secretary of State* v. *Bombay Landing Company*, 5 Bom. H. C. Rep. 6 O. C. J., p. 32.

(3) See preface to his translation of the Daya Bhaga and Mitakshara.

Mitakshara, one of the very earliest of these compilations, is received with respect as the chief general authority, though in each some more modern local work is allowed to compete with it on a few points. The most remarkable of those are the Mayukha for the Máhárashtra and the West, the Smriti Chandrika for the south of India, the Ratnakara and Chintamani for Mithila. Bengal proper alone denies authority to the Mitakshara, having established for itself a totally different school, or which Jimuta Vahana is the head."

Subsequently, he says: "The Mitakshara is equally authoritative with us on this side of India as elsewhere; but, as previously observed, the doctrines of it are sometimes opposed by the Mayukha, which is allowed to compete with it."

Mr. Borradaile observes that Nilakantha's doctrine "sometimes accords with one (Jimuta Vahana and the Digest) and sometimes with the other (the Mitakshara)," but that "conformity with the Mitakshara should be aimed at as far as consistency will allow."

He (in 1827) speaks of it, as stated by one of Nilakantha's descendants, Hari Bhatta Kasikar, as published upwards of 200 years ago, whilst the general opinion is that his (Nilakantha's) writings were first circulated about 125 years ago. Mr. Steele (in 1827) says that the Mayukha "was composed about 300 years ago; it is of chief notoriety in the Karnatic, though attended to both at Poona and Benares."

Mr. Borradaile states that in examining the *vyavasthas*, or expositions of civil law recorded in the Courts under this Presidency, "very little inquiry sufficed to show that the Mitakshara and Vyavahara Mayukha were on all occasions quoted by them."

It must, however, be recollected that, high as undoubtedly is the authority of the Institutes of Manu, the Mitakshara and the Mayukha in this Presidency at large, it cannot be affirmed that the whole of any one of these works is in full force in any part of this Presidency. They are all subject to the control of usage. In all there are precepts which, if they ever were practical law, have, for a time beyond the memory of living man, been obsolete. Many instances might be given. For the present, however, I

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shall limit myself to the mention of one only, and that, too, in the latest of those treatises. There is not any case known in which the co-parcenery, contemplated at the close of the 20th placitum of sec. 8 in chap. IV of the Vyavahara Mayukha between the paternal great-grandfather, the father's brother, and the sons of the half brother, has ever been recognized by the Courts, or has taken effect in practice, and we are not aware that it has ever been even advanced as the foundation of a claim.

Of the proposition that a wife is a *gotraja-sapinda* of her husband, we do not understand that the first branch, viz., that she is a *gotraja* of the husband, has been denied. Before marriage she should be of a different *gotra* from that of her husband;(1) but that, on her marriage, the wife enters the *gotra* (family) of her husband, is a fact familiar to the ears of all acquainted with Hindu usage in this Presidency. Mr. Steele, in his note to the page in his book just mentioned, says: "After marriage a wife's *gotra* becomes that of her husband." To the same effect are the answers of the sastris to question 1, p. 231, and question 3, p. 233, of 1 West and Bühler.(2)

Thenceforward she recites the triple invocation to the manes of the ancestors of her husband,(3) and after his death she makes offerings to his manes.(4) After her death her husband's family alone can perform her funeral rites.(5)

In complete accordance with this doctrine, the Mitakshara(6) and the Vyavahara Mayukha(7) include the paternal grandmother amongst the *gotrajas*. The Mitakshara(8) also consistently names the paternal great-grandmother amongst them. These instances suffice to show that we cannot, in this Presidency, treat the word "*gotraja*" as confined to males. It is observable that, although

(1) Manu, ch. III, pl. 5; Steele on Hindu Law and Customs (1st edn.) p. 33—(2nd edn.) p. 26; Max Müller San. Lit., p. 387.

(2) See also note (2) to *Dhoolubh Bhāi* v. *Jeevee*, 1 Borr. at p. 78.

(3) Manu, ch. IX, pl. 28; Cole. Dig., bk. V, ch. VIII, pl. 399—400.

(4) Mayukha, ch. IV, sec. 8, pl. 2; Mitak., ch. II, sec. I, pl. 6.

(5) 1 West and Bühler 222; Cole. Dig., bk. V, ch. VIII, pl. 432.

(6) Chap. II, sec. V, pl. I. (7) Ch. IV, sec. VIII, pl. 18.

(8) Ch. II, sec. V, pl. 5.

Mr. Monier Williams, in his Dictionary (page 297, column 2), gives to that word the two limited meanings of 'born in the same family,' adding, however, also the meaning of 'relation' or 'gentile,' he is careful to refrain from describing it as denoting any one gender more than another. Visvesvara, in discussing, in the Subodhini, the rights of the paternal grandmother as laid down in the Mitakshara, says that there is no objection to understand the word '*gotrajas*' in the sense of 'male and female *gotrajas*,'[1] and he, as we shall subsequently see, gives effect to that opinion. Those authorities and the instances of female *gotrajas* already specified, render it unnecessary, I think, to endeavour to fortify our opinion by resort to the ambiguous case of a sister, whom Nilakantha in the Vyavahara Mayukha brings in as an heir after the paternal grandmother, which the sister undoubtedly is in this Presidency.[2] It seems to me that he introduces her rather on the ground of *sapinda-ship* than of *gotra-ship*, but calls to his aid a quibbling play upon the term '*gotra*' as a make-weight. The passage[3] relating to the sister is, in Mr. Borradaile's translation, so infelicitously rendered as to be, especially towards its conclusion, absolutely unintelligible. In a re-translation, made for the purposes of this suit by competent scholars, and approved by this Court, it runs thus :—"19. In case of the non-existence of that (the paternal grandmother) the sister (takes) according to the *dictum* of Manu,[4] that 'whoever is the nearest *sapinda* his should be the property;' and according to the text of Brihaspati,[5] that where there are many jnati, sakulyas and bandhavas, among them whoever is the nearest he should take the property of the childless; she the sister also being born in the brother's *gotra*, and so there being no difference of *gotrajatva* (the state of being born in the *gotra*). But (says an objector) there is no *sagotrata* (state of being in the same *gotra*). True, but neither is that stated here as a reason for taking property." *Sagotra* is an abbreviation of *samanagotra*, which means "in the same *gotra*," or "a person in

(1) 1 West and Bühler 146.

(2) *Vinayek Anandrão* v. *Lakshmibái*, 1 Bom. H. C. R. 117, 126, S. C. 9 Moo. Ind. App. 516.

(3) Stokes' Hindu Law, Vyav. Mayukha, ch. IV, sec. VIII, pl. 19.

(4) Chap. IX, pl. 187; Cole. Dig., bk. V, ch. VIII, pl. 434.

(5) Cole. Dig., bk. V, ch. VIII, pl. 437, cl. 4.

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the same *gotra*." Nilakantha's concluding sentence amounts to no more than an assertion that the sister was at her birth a *gotraja* of her father and brother, which is true, but is followed by what is tantamount to an admission that on her entrance into the married state (which her religious law imperatively required her to assume) she ceased to be their *gotraja*, *i.e.*, she was no longer a *sagotra*. So far, therefore, as *gotra-ship*, as understood in this Presidency, is an essential qualification for inheritance, she, if her marriage preceded her brother's death, would not be qualified to succeed to his estate, inasmuch as, after her marriage and consequent transfer to the *gotra* of her husband, the only relation which existed between her and the family in which she was born, was *sapinda-ship* and not *gotra-ship*. It is worthy of note that Nilakantha seeks to justify the introduction of the sister as an heir by reference to a text of Brihaspati (*alias* Vrihaspati) which, like the text of Manu, also relied upon by Nilakantha, does not specify the sister: whereas there is another text of Brihaspati that does expressly name her, but apparently introduces her at an earlier stage of the succession. It is as follows:—"But she, who is his sister, is next entitled to take the share; this law concerns him who leaves no issue, nor wife, nor father, *nor mother*."(1) The words "nor mother" have been added to that text by the translator, Mr. Colebrooke, in conformity with another text of Brihaspati,(2) which provides for the succession of the mother to a son (who dies leaving neither wife nor male issue), unless she consent to waive her right in favour of the brother of the deceased. Some of the Bombay sastris have been so far influenced by Nilakantha's play upon the term "*gotra*" as to style the sister '*gotraja*' as well as *sapinda*.(3) The better opinion seems, however, to me to be that which would regard her heirship as dependent either on the special mention of her by Brihaspati and Nilakantha, or upon her *sapinda-ship*. The assertion of the latter that she has '*gotrajatva*,' *i.e.*, the state of being born in the *gotra*, substantially amounts to no more than a statement that she is a *sapinda*.

(1) Cole. Dig., bk. V, ch. VIII, pl. 407, cl. 3.
(2) Cole. Dig., bk. V, ch. VIII., pl. 423, and see Manu, *Ibid.*, pl. 424.
(3) 1 West and Bühler, 150—152, and see p. 155.

The answer to the question—whether the wife is a *sapinda* as well as a *gotraja* of her husband ?—must also, we think, be, in this Presidency at least, in the affirmative.

In the Achara Kanda of the Mitakshara, (translated at page 141 of 1 West and Bühler,) Vijnyanesvara states his views as to what constitutes *sapinda-relationship* as follows :—

"(He should marry a girl) who is non-sapinda, *i.e.*, *asapinda* (with himself). She is called his sapinda (who has particles of) the body (of some ancestor, &c.) in common (with him). Non-sapinda means not his sapinda. Such a one (he should marry). Sapinda-relationship arises between two people through their being connected by particles of one body. Thus the son stands in sapinda-relationship to his father, because of particles of his father's body having entered (his). In like (manner stands the grandson in sapinda-relationship) to his paternal grandfather and the rest, because through his father particles of his (grandfather's) body have entered into (his own). Just so is (the son of a sapinda-relation) of his mother, because particles of his mother's body have entered (into his). Likewise (the grandson stands in sapinda-relationship) to his maternal grandfather and the rest through his mother. So also (is the nephew) a sapinda-relation of his maternal aunts and uncles, and the rest, because particles of the same body (the paternal grandfather) have entered into (his and theirs); like wise (does he stand in sapinda-relationship) with paternal uncles and aunts, and the rest. So also the wife and the husband (are sapinda-relations to each other), because they together beget one body (the son). In like manner brothers' wives also are (sapinda-relations to each other), because they produce one body (the son) with those (severally) who have sprung from one body (*i.e.*, because they bring forth sons by their union with the offspring of one person, and thus their husband's father is the common bond which connects them). Therefore, one ought to know that, wherever the word sapinda is used, there exists (between the persons to whom it is applied) a connection with one body either immediately or by descent."

This shows that Vijnyanesvara abandoned the doctrine that the right to offer funeral oblations alone constituted *sapinda-ship*, and

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adopted, in lieu of it, the theory that *sapinda-ship* is based upon community of corporal particles, or, in other words, upon consanguinity, and that he maintained that there is such a community between the wives of collaterals. In a subsequent passage of the same work (also translated by Messrs. West and Bühler,[1]) Vijnyanesvara assigns the limits in point of degree to *sapinda-relationship* as founded on the theory laid down by him.

The constitution of *sapinda-relationship* by community of particles meets with a passing recognition from Nilakantha in the 4th chapter of his Vyavahara Mayukha. That recognition is, however, so obscured in Mr. Borradaile's translation as almost to escape notice. At the end of placitum 21 of the 5th section of chapter IV, Nilakantha, in discussing the law of adoption, quotes Manu, and Mr. Borradaile translates the quotation thus :—" A given son must never claim the family and estate of his natural father : the funeral oblation follows the family and estate, but of him who has given away his son, the obsequies fail."[2]

In Haughton's revised edition of the translation of Manu by Sir William Jones[3] and also in Colebrooke's translation[4] the same text is rendered thus :—"The funeral cake follows the family and estate, but of him who has given away his son the funeral oblation is extinct." The word rendered by Mr. Borradaile " funeral oblation" and by the others "funeral cake" is in the original Sanskrit of Manu "*pinda*," and the word rendered by Mr. Borradaile "obsequies" and by the others "funeral oblation" is in the original Sanskrit "*svadha*," a word used in several senses,[5] but here apparently employed to denote the customary food or oblation offered to the *pitris*, or spirits of deceased ancestors, or the *srāddha* or funeral ceremony itself. Nilakantha's commentary in plac. 22 of the chapter and section of the Vyavahara Mayukha last mentioned, on this text of Manu, is thus translated: " 'Follows the family and estate,' goes after the family and estate, the latter expression corresponding generally with the term 'goes along with.' 'The

(1) 1 West and Bühler, 142, 143.

(2) Stokes' Hindu Law, Vyav. Mayukha, ch. IV, sec. V, pl. 21.

(3) Ch. IX, pl. 142. (4) Cole. Dig., bk. V, ch. IV, pl. 181.

(5) Monier Williams' Dictionary, p. 1159, and see Manu, ch. III, pl. 252.

given son' the simple adopted ; since in the case of a *dwyamushyáyana*, the (double) obligation of family connexion and the like be hereafter declared. The funeral oblation," (*pinda*) "according to Medhatithi, Kalluka Bhatta and others, means the funeral ceremony and other *srāddhas*, (*srāddhamaurddhadehikaditi*). According to other authors, again, the 'funeral oblation,'" (*pinda*) "means sapinda connexion," (*sāpindyam*) ; "and 'obsequies,' the funeral and other *srāddhas*" (*svadaurddhadehikasraddhaditya*). If the word *sāpindyam*, which Mr. Borradaile has here translated "sapinda connexion," had been rendered "consanguinity," (see Monier Williams' Dictionary, p. 1106), or "connexion by community of corporal particles," it would have brought out more distinctly the meaning of the commentator Nilakantha, who was evidently here referring to the deviation of the Mitakshara and its followers, as to the force of the term '*sapinda*,' from the doctrine of connexion by the offering of funeral oblations maintained by other treatises and commentators.

That this was his meaning, is apparent from certain passages in his work, the Sanskara Mayukha,[1] of which treatise no English translation has yet been published. The following translation by competent scholars thus renders one of these passages as it stands at page 45 *et seq.* of the Sanskrit original :—"Now (about) marriage : Yajnavalkya (says) :—One should marry a woman (who) has not been before married by another man ; (who) is amiable ; (who) is not of the same pinda (with the intended husband) ; (who) is young"

* * * * (In explaining each of the above qualifications fully, the following explanation is given of the term "*asapinda*.")

"(Now) about (the word) asapindam. In Matsya Puran (it is stated) that the sapindata (extends over) ends with seven persons (purusha).[2] And thus Devadatta[3] has "sāpindya" (state of being of the same pinda) with the six persons (purusha) commenc-

(1) Treating of the sixteen initiatory ceremonies. At p. vi of the Introduction to 1 West and Bühler there is an enumeration of his writings.

(2) 'Purusha' primarily means a man, but is frequently used as the word 'person' in English to represent a member (male or female) of the human species. See Monier Williams' Sanskrit and English Dictionary, p. 585.

(3) The *propositus*.

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ing with his father and with the six persons commencing with his son. The seven persons (purusha) means including the seventh person (purusha). In this way, then, there will be no sāpindya with the sister, &c. Here some have explained away (the difficulty) thus: Sāpindya is maintained on account of (her) being intended[1] as a deity (in Pindadava); and thus in the srāddha, of which Devadatta is the performer, the sister, &c., also being intended, they have certainly sāpindya. If so, then, in Mahalaya,[2] srāddhas and the like there will be sapinda-relationship (sāpindyam between guru (preceptor) and shisya (pupil), &c. Hence Vijnyanesvara[3] and others abandoned the theory of connexion through the rice-ball offering, and accepted the theory of transmission of constituent atoms. Therefore, (to explain the different parts in the formation of the word 'asapinda' by dissolving the compound 'asapinda,') she is sapinda who has one and the same pinda (body) (*i.e.*) dehávayava (constituent atoms) na (not) sapinda is 'asapinda.' Thus, therefore, the father's constituent atoms, viz., blood, fat, &c., directly enter into the body of the son; and (the constituent atoms) of the paternal grandfather (enter the son's body) through the medium of the father. In the same manner with reference to (the constituent atoms of) the paternal great-grandfather, &c., also, somehow the transmission of constituent atoms mediately exists. So with the mother, &c.; also, so the wife has sāpindya with the husband, because they are the generators of one body. In some instances, sāpindya exists also by reason of being the holders of the same constituent atoms. Thus, the wives of brothers are sapindas to each other, for they hold the constituent particles of the same father-in-law through the media of their husbands. In this way somehow the sāpindya in other cases also should be inferred."

It has been contended for the plaintiffs that in the above extracts from the Achara Kanda and the Sanskara Mayukha the respective authors were dealing with *sapinda-relationship* in its ceremonial aspect only, and that, when they wrote upon *sapinda-*

(1) *i.e.*, included in the invocation.

(2) The great annual sacrifice in the month of Bhádropada.

(3) The author of the Mitakshara.

relationship with reference to inheritance, they may be regarded as viewing *sapinda-relationship* in the same light as the author of the Daya Bhaga and certain other commentators on Hindu law. But we think that the burden rests upon the plaintiffs to show that Vijnyaneswara and Nilakantha regarded *sapinda-relationship* as resting on a different basis for the purpose of inheritance from that on which, dogmatically perhaps, but most distinctly, the one has placed it in the Achara Kanda and the other in the Sanskara Mayukha. We do not think that the learned counsel for the plaintiffs have given any good reason for assuming that the authors intended to make any such difference, nor is it likely that they did.

The religious and ceremonial law of the Hindus as prevailing amongst castes, or in particular localities, is, generally speaking, almost inseparably blended with their law of succession in the same castes or localities, an opposite condition being exceptional. If Vijnyaneswara and Nilakantha contemplated such a distinction between *sapinda-ship* for the purpose of inheritance and *sapinda-ship* with respect to marriage and ceremonial or religious purposes, we certainly believe that they would have expressly said so. Messrs. West and Bühler in their valuable work on Hindu law (page 140 *et seq.*) regard the definition of *sapinda-ship* given in the Achara Kanda as applicable to inheritance, and, in that portion of the Mitakshara, Vijnyaneswara expressly says that "*wherever the word 'sapinda' is used*, there exists (between the persons to whom it is applicable) a connection with one body either immediately or by descent."

A translation of a not very lucid passage in the Vira Mitrodaya of Mitra Misra has been brought to our notice, in which the author, after referring to the canons of succession laid down by Vijnyaneswara in chap. II, sec. V, of the Mitakshara with reference to the text of Yajnyavalkya in favour of *gotrajas* (gentiles), quotes at great length and controverts the remarks of Devanda Bhatta in the Smriti Chandrika, chap. XI, sec. V, wherein he maintains that the term '*gotraja*' ought to be construed as including males only, and relies on the Vedic text (Sruti) which by some has been rendered to the effect that "females and persons deficient in an organ of sense or member are deemed incompetent

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to inherit." Mitra Misra also quotes and impeaches certain passages in the Daya Bhaga of Jimuta Vahana[1] in which that author maintains that Yajnyavalkya used the term '*gotrajas*' for the purpose of excluding from inheritance females who are *sapindas*; and, relying upon Baudhayana's interpretation of the Vedic text already mentioned as generally excluding females from inheritance, says that the admission of the widow and certain others is exceptional, and depends upon express texts. Although, as we have seen, Mitra Misra condemns the reasoning in the Smriti Chandrika and Daya Bhaga, whereby Devanda Bhatta and Jimuta Vahana compass the exclusion of females from inheritance, he (Mitra Misra) himself construes the Vedic text as excluding women, because, he says, even supposing, with the venerable Vidyaranya, that "*indriya*" means *soma* juice, yet the word "*adáyádatva*" in itself is sufficient to imply a prohibition to inheritance of women. This, however, is not very conclusive reasoning. Although *adáyáda* is often used to signify "not entitled to be an heir," and "*adáyádatva*" the condition of one not entitled to inherit, yet these are not always or necessarily the meanings of those words. They may be applied to non-participation in any particular thing: as, for instance, non-participation in the *soma* juice. And such would appear to be the proper rendering, if Vidyaranya be right in affixing on "*indriya*" the meaning of *soma pithá* (*soma* drink) as he does in the Daya Vibhaga chapter of the Vyavahara Kanda of his Madhaviya Commentary on the Párasara Smriti, which chapter has been translated by Mr. Burnell, and published at Madras in 1868 (see page 33 of that translation).

Messrs. West and Bühler[2] say that the Vedic text may be translated thus: "Women are considered disqualified to drink the *soma* juice, and receive no portion (of it at the sacrifice)."

It should, perhaps, be mentioned that Mitra Misra, in the above passage of the Vira Mitrodaya, probably quoting from memory as was his habit,[3] has apparently (if the translation furnished to us be correct) misrepresented that portion of Jimuta Vahana's arguments contained in chap. XI, sec. VI, pl. 10 of

(1) Stokes' Hindu Law, Daya Bhaga, ch. XI, sec. VI, pl. 10, 11.

(2) 1 West and Bühler, p. 145, note.

(3) See the note to 2 West and Bühler, 100.

Mr. Colebrooke's translation of the Daya Bhaga. He (Mitra Misra) represents Jimuta Vahana as speaking of "the grandson through the daughter of the father" as born in the *gotra* of his mother's father, which cannot be true. What was probably meant by Jimuta Vahana was "he, too, being by such offering connected with the *gotra*." Again, Mitra Misra in the same place describes Jimuta Vahana as saying of the female *sapindas* "these not being born in the *gotra*." What Jimuta Vahana probably meant was what Colebrooke has translated him as having said, viz., "females related as *sapindas*, since these also sprung from the same line." For the word "since," perhaps, it might be well to substitute "notwithstanding that." Finally, with respect to the Vira Mitrodaya, I should observe that it is not regarded so much here as at Benares, and occupies a place, amongst the works of authority in this Presidency, far below the Mitakshara and Mayukha, and is not accepted when in conflict with them.

The doctrine that *sapinda-ship* proper depends upon community of corporal particles (or consanguinity), and not upon the presentation of funeral oblations to the pitrás, is strongly maintained by Nanda Pandita in the Dattaka Mimansa. In sec. VI, pl. 6 he quotes the text of Manu, which, together with Nilakantha's Commentary upon it in the Vyavahara Mayukha, has been already mentioned, and then he (Nanda Pandita) elaborately contends[1] that although affiliation for the purposes of inheritance and funeral oblations takes place, yet the given son does not and cannot become a *sapinda* proper (*i.e.*, by consanguinity or community of particles) of the adoptive father, but continues to be such a *sapinda* to the seventh degree of his natural father and to the fifth degree of his natural mother,[2] and is by special texts only and in virtue of funeral oblations constituted heir and a quasi-*sapinda* of his adoptive father to the third degree.[3] Placitum 10 of that section and Mr. Sutherland's note upon it, are especially deserving of attention. That note is: "The word '*pinda*' signifies either the 'body' or a 'cake,' or ball of food presented to the manes of the deceased: the word '*sapinda*,' therefore, may denote

(1) Pl. 7 to pl. 39, both inclusive.

(2) See pl. 10 and pl. 11, where Nanda Pandita quotes Gautama to this effect.

(3) Pl. 32 *et seq.*

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either one consanguineally related, or one connected through an oblation of such funeral cake." In the original edition of Mr. Sutherland's translation of the Dattaka Mimansa, published at Calcutta in 1821, the typographical errors are least numerous.

Nanda Pandita especially notices the case of a daughter[1] whom he treats as being, in accordance with the theory that *sapinda-ship* rests upon a community of corporal particles, the *sapinda* as well of her husband as of her father. This view is also upheld by Mr. Sutherland in his note to placitum 14 of section VI. She would, however, cease to be the *gotraja* of her father after her marriage, as already observed. Her right to inherit, therefore, depends either upon the special mention of her as an heir, or as being a *sapinda* of her father.

In endeavouring to place a proper construction upon the doctrines of the respective treatises of Vijnyaneswara and Nilakantha which more especially relate to partition and inheritance, it is, we think, indispensable to keep in view the definition of *sapinda-ship* as laid down by those authors in the passages which we have quoted. Otherwise we should arrive at conclusions altogether opposed to their systems, which have so long been recognized, and to a great extent brought into harmony with each other, by usage and in the administration of justice at this side of India. It should also be borne in mind that the sastris, who have furnished in times past the opinions (*vyavasthas*) on Hindu law to our civil Courts on which the decisions of the latter have been based, referred for authorities not to any English translations of the Hindu smritis and commentators (including, amongst the latter, Vijnyanesvara and Nilakantha), but to the original Sanskrit, and, as will be shown in detail by my brother West, have read the Mitakshara and Mayukha, when dealing with *sapinda-ship* in relation to inheritance, in the sense of the passages above extracted from the Achara Kanda and Sanskara Mayukha.

We yield to none in respect for the erudition, accuracy, and discrimination of Mr. Colebrooke; but it is impossible not to perceive that, in his translation of the portion of the Mitakshara which

(1) Sec. VI, pl. 14, 67.

relates to partition and inheritance, he has overlooked the definition given by Vijnyanesvara himself, in the Achara Kanda, of the meaning which he attributes to the term "*sapindas*." Mr. Colebrooke's experience lay principally on the eastern side of India; and he has given to the term "*sapindas*" the same meaning, viz., "persons connected by funeral oblations," which it bears in the Daya Bhaga of Jimuta Vahana of the Bengal school, and which Mr. Colebrooke in his English translation of that treatise had given to the same term. The fifth section of chap. II of his translation of the Mitakshara is that which most especially bears upon the question of Mánkuvarbái's claim to be regarded as a *gotraja-sapinda*. After removing from that translation the English rendering of the names of the various classes of kindred and substituting the Sanskrit names given in the original, that section would run thus:—

"1. If there be not brother's sons, *gotrajas*[1] share the estate. *Gotrajas* are the paternal grandmother and *sapindas*,[2] and *samanodakas*.[3]

"2. In the first place, the paternal grandmother takes the inheritance. The paternal grandmother's succession immediately after the mother was seemingly suggested by the text before [4] cited, 'And the mother also being dead, the father's mother shall take the heritage';[5] no place, however, is found for her in the compact series of heirs from the father to the nephew; and that text ('the fathers's mother shall take the heritage') is intended only to indicate her general competency for inheritance. She must, therefore, of course, succeed immediately after the nephew; and thus there is no contradiction.

"3. On failure of the paternal grandmother, *gotraja-sapindas*,[6] namely, the paternal grandfather and the rest, inherit the estate. For *bimnagotra-sapindas*[7] are indicated by the term '*bandhu*.'[8]

(1) Trans. by Colebrooke "gentiles."
(2) Trans. by Colebrooke "relations connected by funeral oblations of food."
(3) Trans. by Colebrooke "relations connected by libations of water."
(4) Mitak., ch. II, s. I, pl. 7. (5) Manu, ch. IX, pl. 217.
(6) Trans. by Colebrooke "kinsmen sprung from the same family with the deceased, and connected by funeral oblations."
(7) Trans. by Colebrooke "kinsmen sprung from a different family, but connected by funeral oblations."
(8) Trans. by Colebrooke "cognate."

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"4. Here, on failure of the father's descendants, the heirs are, successively, the paternal grandmother, the paternal grandfather, the uncles, and their sons.

"5. On failure of the paternal grandfather's line, the paternal great-grandmother, the great-grandfather, his sons and their issue inherit. In this manner must be understood the succession of *samanagotra-sapindas*.(1)

"6. If there be none such, the succession devolves on *samanodakas;*(2) and they must be understood to reach to seven degrees beyond *sapindas;*(3) or else as far as the limit of knowledge and name extend. Accordingly, Vhrat Manu says:—'The relation o the *sapindas* ceases with the seventh person, and that of *samanodakas*(4) extends to the fourteenth degree; or, as some affirm, it reaches as far as the memory of birth and name extends.' This is signified by *gotra*."(5)

The fifth section, as a whole, leads me to the conclusion that Vijnyanesvara intended to place the paternal grandmother as first of the *gotraja-sapindas* after the compact series of heirs. The last sentence in the 5th placitum of that section (viz. "In this manner must be understood the succession of *samanagotra-sapindas*") I think applies to all of the persons named in that and the preceding placitum, and amongst these the first is the paternal grandmother. Those placita (4 and 5), though severed in the translation, are continuous in the original Sanskrit. This remark may be extended to all of the placita in that (the fifth) section. The division into placita is the work of the translator.

It has been urged on behalf of the plaintiffs that, although the paternal uncle's sons (under which denomination Gangádás, the deceased husband of Mánkuvarbái, would fall) are named amongst *gotraja-sapindas* in plac. 4 and 5 of the above section, there is not any mention of the wives of such paternal uncle's sons. The

(1) Trans. by Colebrooke "kindred belonging to the same general family and connected by funeral oblations."

(2) Trans. by Colebrooke "kindred connected by libations of water."

(3) Trans. by Colebrooke "the kindred connected by funeral oblations of food."

(4) Trans. by Colebrooke "those connected by a common libation of water."

(5) Trans. by Colebrooke "the relation of family name."

plaintiffs, however, are not in a position to contend that the list of *gotraja-sapindas* contained in those placita is exhaustive; for, if it were, they would be excluded from the *gotraja-sapindas* as not being named in that list. However, the author of the Subodhini names as *gotraja-sapindas* several persons not specified in placita 4 and 5, and amongst them are the paternal great-grandfather's mother and the paternal great-grandfather's grandmother, and he says that the same analogy holds good amongst the *samanodakas*.(1) There does not appear to be any better reason for supposing that Vijnyanesvara's enumeration in these placita of *gotraja-sapindas* is exhaustive than his enumeration of *bandhus* (bandhavas) in plac. 1 of sec. VI in chap. II, which has been held to be illustrative only and not exhaustive: *Girdhárilall* v. *The Bengal Government*,(2) *Amrita* v. *Lakhinárayen*.(3) And as more than once already observed, both Vijnyanesvara in the Achara Kanda and Nilakantha in the Sanskara Mayukha include the wives of male *sapindas* amongst the *sapindas*. That Baudhayana's interpretation of the Vedic text to the exclusion of women from inheritance has not been adopted by Vijnyanesvara is further shown by the Mitakshara, plac. 24, 25 and 26 of ch. II, sec. 1, as to the general competency of women to inherit; and if it be contended that those placita relate only to the widow, whose rights are the subject of that section, the reply is, that his subsequent introduction in sec. V of the paternal grandmother and paternal great-grandmother amongst the *gotraja-sapindas* as heirs shows that those placita are not to be confined to the widow, and this view is corroborated by the additional list of *gotraja-sapindas* in the Subodhini. In the 18th plac. of sec. VIII in chapter IV of the Vyavahara Mayukha, Nilakantha puts it beyond doubt that a woman may inherit as a *sapinda* by expressly naming the paternal grandmother as first of the *gotraja-sapindas* for the purpose of inheritance. That placitum in the translation of part of sec. VIII which has been mentioned as in evidence in this cause runs thus:—

"18. In the case of the non-existence of the brother's sons, the gotraja-sapindas succeed. The first among these is the pater-

(1) See Colebrooke's note to sec. V, pl. 5, of the Mitakshara.

(2) 12 Moo. Ind. App. 448. (3) 2 Beng. L. R. 28 F. B.

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nal grandmother according to the *dictum* of Manu" (chap. IX, sloka 217), "that if the mother also be dead, the father's mother should take the property. Although she is mentioned after the mother, yet as she is not introduced in the fixed order ending in the brothers' sons, and as agantus," (persons coming in accidentally), "she should be introduced after the brothers' sons." Whatever criticism or doubt his mention of the sister as a *gotraja* in the following (19th) placitum, already quoted by us, may be subject to, cannot be extended to his denomination of her as a *sapinda* in the same placitum. It is quite consistent with his adoption of the community of particles as the basis of *sapindaship*, and is an additional proof that he did not limit that doctrine to marriage or ceremonial matters. It is also consistent with Kalluka Bhatta's introduction of the words "male or female" into plac. 187 of Manu, chap. IX. It certainly seems less difficult to construe "*sapindas*" as including females than to interpret "sons" as including daughters and "brothers" as including sisters, both of which heights have been scaled in Hindu hermeneutics.

For these reasons we think that females may be *gotraja-sapindas* for the purpose of inheritance in accordance with the doctrine of the Achara Kanda chapter in the Mitakshara and of the Sanskara Mayukha. My brother West will state the grounds on which we have arrived at the conclusion that Mánkuvarbái, as wife of Gangádás, the first cousin of Mulji Nandlál, is, in conformity with that view, to be deemed a *gotraja-sapinda* of Mulji Nandlál, and nearer, as such, in position to him than the plaintiff Lallubhái and his brother Mulchand.

If this case were not to go beyond this Court, our decision on the fifth of the new issues involving the question of Hindu law would render any determination of the points involved in the first and second of those issues unnecessary. But as it is not improbable that this case may be taken to Her Majesty's Privy Council, we have deemed it the better and least expensive course for the parties that we should decide these points also, in order that, if their Lordships should take a different view of the question of Hindu law from that which we have now expressed, they may be

in a position finally to dispose of the whole case without remanding it on the other points for the determination of this Court.

We concur with Mr. Justice Bayley in his findings in the negative on the first and second of the new issues referred to him by this Court. We also concur with him in holding that his finding on the second issue rendered any findings on the third and fourth of the new issues unnecessary. We differ from him in his finding on the fifth of the new issues, and we resolve that issue in the negative, and, therefore, declare that neither the plaintiffs nor either of them, nor Mulchand Bápubhái, the father of the plaintiff Kásidás Mulchand, was or were, at the decease of Sarasvatibái, entitled to the moveable and immoveable estate of Mulji Nandlál, or to either of the same or any part thereof.

We accordingly affirm the original decree of the Division Court made on the 20th day of April 1872, except so far as it is hereinafter altered as to costs. We vary that decree as to costs by directing that all parties, other than Diváli and Kásibái, bear their own costs in the said Division Court and in this appeal; and we further direct that the costs incurred in making Kásibái, as executrix of Mánkuvarbái, a party for a second time, should be borne by Kásibái. My brother Sargent concurs in this judgment. My brother West concurs in so much of it as relates to the question raised on the fifth issue. In the rest of the case he has not taken any part.

WEST, J.:—Of the plaintiffs in the present case Lallubhái is the seventh and Kásidás the eighth in descent according to the inclusive mode of reckoning followed by the Hindus, from Motiláll the sixth in ascent, by the same method from the deceased Mulji whose former property is the subject of dispute. According to the law prevailing in Bengal, neither of the plaintiffs would rank as a *sapinda* of the deceased. When the common ancestor (within three degrees) is reached, the collateral descent constituting *sapinda-ship* stops with his great-grandson, or, if the connexion be through his daughter, with the grandson.(1) The maternal relations within the same degrees take the next

(1) Stokes' Hindu Law, Daya Bhaga, ch. XI, sec. VI, pl. 6-7; Dáyakram Sañgraha, ch. I, s. X.

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place, and those must be exhausted before the next class, called the *sakulyas*, come in. These are three descendants below the great-grandson and three ascendants above the great grandfather with the collateral descendants from each down to the great-grandson, or the grandson through a daughter, as in the case of the *sapindas*.(1)

According to this system, Lallubhái, the plaintiff in the present case, would be excluded from the inheritance by the nearer collateral relatives of Mulji, if any, through his mother as well as through his father. As a descendant from a *sakulya*, but beyond the third in descent, he could rank only as a *samanodaka* under the rule indicated in Cole. Dig., bk. V, ch. VIII, pl. 436, which does not, indeed, expressly provide for his case, but by extending the line of heirs springing from the eighth ascendant down to the fourteenth in descent, gives inferentially the like right to descendants beyond the third from the nearer ascendants in the line above the *propositus*.

According to the Smriti Chandrika, which may, apparently, be regarded as the governing authority in Madras, and the Vyavahara Madhava, which also is of weight in that Presidency, the maternal relatives do not come in immediately after the nearer *sapindas ex parte paternâ* as in Bengal. The ascending line of *sapindas* continues for six degrees, and then follow six *samanodakas*. But only the son and grandson, no daughter or daughter's son of an ascendant, are recognized in each instance as coming next after their progenitor. Failing them the succession goes one degree higher, and when the class of *samanodakas* thus constituted has been exhausted, the *bandhus* are brought in,—connexions within five degrees, one of which is through a female.(2) According to this system, Lallubhái's right could not arise, at any rate while there remained a son of the paternal aunt or of the maternal uncle or aunt of the deceased Mulji, or any one standing within the same degree of relationship to Mulji's father or his mother.

(1) Cole. Dig., bk. V, ch. VII, pl. 434 and 435 Comm.; Vyavasthá Darpana, s. 303.

(2) West and Bühler 177; *Girdhárilall* v. *Government of Bengal*, 12 Moo. I. A. 448.

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By the Mitakshara doctrine, as given at 1 West and Bühler 143, those who are within six degrees of a common ancestor in the male line are *sapindas* of each other. In his actual enumeration, indeed, of those taking as *gotraja-sapindas*, Vijnyanesvara stops at the third in descent in the collateral lines,[1] and on this Colebrooke grounded a remark that the Mitakshara line of succession was confirmed by the Vyavahara Madhava and the Smriti Chandrika, but on account of the extension of the *sapinda-relationship* authorized by Vijnyanesvara's comment on Yajnavalkya I 52 to 53,[2] and sanctioned by the Privy Council,[3] the two orders of succession coincide only to a limited extent. By the Mitakshara the heritable descent may be traced to the sixth below the point of divergence of the two lines. Lallubhái is, therefore, through their common ancestor Motiláll, a *sapinda* of the deceased Mulji. He is not to be excluded from inheritance to Mulji either by *sapindas ex parte maternâ* as in Bengal, or by the *bandhus* as in Madras. The sole question is, whether his right is preferable to that of Mánkuvarbái, the widow of Mulji's first cousin. Such rights as might have been vested in Bháishet have been, it was said, purchased by Mánkuvarabái; but Pránkuvar, the grand-mother of Bháishet, having died before her brother Mulji, inherited nothing from him, and her son Trikamlál, standing in the relation of a *bandhu* to Mulji his maternal uncle (*Girdhárilall* v. *Government of Bengal*),[4] could not succeed while any *gotraja-sapindas* of Mulji, or even a *samanodaka* of Mulji, survived. Nothing, therefore, on Trikamlál's death descended to Bháishet which could form an obstacle to the success of Lallubhái's claim in this case. The alleged will, in Bháishet's favour, of Mulji's widow Sarasvatibái, and the alleged transaction between him and the defendant Mánkuvarabái, have been disposed of in the judgment of my Lord the Chief Justice.

The succession of the male *gotraja-sapinda* themselves not being provided for in detail by the law books has, as we have seen, given rise to some controversy. The same texts have been con-

(1) Stokes' Hindu law, Mitak., ch. II, sec. 5, and ch. IV, sec. 5.
(2) 1 West and Bühler 143.
(3) 1 West and Bühler 139, and see *Bhyah Rám Singh* v. *Bhyah Újár Singh*, 13 Moo. I. A. 373.
(4) 12 Moo. I. A. 448.

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strued by the different schools as pointing to lines which are then to be pursued to a greater or less distance according to the governing principles of interpretation which each school has adopted. As to the right of widows to take the places of their deceased husbands, the meagre indications of the texts have left still more room for dispute, and it has thus been possible for the learned counsel on each side in the present case to lay before us arguments of considerable weight both for the admission and for the rejection of this principle as part of the Hindu law.

The incapacity of women in ordinary cases for inheritance, as pointed out in the case of *Bhau Nanaji* v. *Sundrábái*,[1] was probably at one time a generally received doctrine. It forms the basis of the Bengal and Madras laws still,[2] but it is discarded by the Mitakshara,[3] which, agreeably to the principles laid down by it in discussing the rights of a widow, includes the grandmother and great-grandmother amongst the *gotraja-sapindas*. By the other method of interpretation illustrated in the Smriti Chandrika (Engl. Transl., p. 192) *gotraja*, being regarded as essentially masculine in sense, is held to exclude females, though room is made for those who are provided for by special texts. The mere recognition, by Vijnyanesvara, of the mother and paternal grandmother as heirs, might be accounted for by the same texts; but the class in which he places the grandmother, and his inclusion in the same class of the paternal great-grandmother (unentitled except as a mere *gotraja-sapinda*) show that he accepted women's heritable capacity as a general principle enabling him to extend the text of Yajnyavalkya to females not expressly mentioned as heirs in any of the extant Smritis.

It is said that the reason which Vijnyanesvara gives for the precedence which he assigns to the mother over the father, as heir to a son, rests on a ground which, though in part applicable to the grandmother and other female ancestors of the *propositus* in the paternal line, affords no support whatever to the claims of widows of collaterals. The reason assigned for the preference given

(1) 11 Bom. H. C. Rep. 249.
(2) See the Smriti Chandrika, ch. IV, pl. V; Daya Bhaga, ch. X, sec. VI, pl. 11.
(3) See Mitak., ch. II, sec. I, pl. 22, 24, 25.

to the mother[1] seems a very artificial one. Nilakantha in the Mayukha[2] declines to recognize it. Jagannatha[3] seems to prefer the father, though not decisively. Vachaspati Misra pronounces for the mother's precedence on the authority of Vishnu and Brihaspati,[4] though as to the former he seems to be mistaken,[5] and Brihaspati's rules do not appear to be quite self-consistent.[6] He cites texts of Manu also which might well be construed adversely to this doctrine of the Mithila school. The question might probably be resolved with equal plausibility in either way. But whether Vijnyanesvara's reasons for preferring the mother to the father are good or bad, he does not assign them in favour of the grandmother or great-grandmother. The grandmother he[7] brings in on the strength of a text of Manu,[8] which, as he has to depart from its literal sense, would have enabled him, so far as one can see, to place her as well after as before the grandfather,[9] yet in the precedence which he assigns to her he has been followed by the Mayukha.[10] He has probably determined her place and that of the great-grandmother relatively to their husbands by analogy to the place of the mother relatively to that of the father (as in the Daya Bhaga);[11] and that he did not intend in other respects to give to these ancestors any right except that of *gotraja-sapindas*, is clear from the way in which he sets aside the literal sense of Manu's text assigning to the grandmother the next place after the mother. This would have enabled him to bring her in, as he has brought in the daughter's son[12] apart from her position as a *gotraja*, so that it is clear he thought she was properly included in the class, and afforded an analogy for dealing with the cases of other wives of *gotrajas*, at least in the ascending line.

The difficulty arises in the transition from wives of male *gotrajas* in the ascending line, who take precedence of them, to wives

(1) Mitak., ch. II, sec. III, (2) Ch. IV, sec. VIII, pl. 15.

(3) Cole. Dig., bk. V, pl. 424 Comm.

(4) Vivâda Chintâmani, pl. 293, English translation.

(5) See 1 West and Bühler 341. (6) Cole. Dig., bk. V, ch VIII, pl. 422, 423.

(7) Mitak., ch. II, sec. I, pl. 7; sec. V, pl. 2.

(8) Manu, ch. IX, pl. 217. See also Catyâyana quoted in Cole. Dig., bk. V, ch. VIII, pl. 425.

(9) Mitak., ch. II, sec. V, pl. 1, 2, 3.

(10) Ch. IV, sec. 8, pl. 18. (11) Ch. XI, sec. V, pl. 4.

(12) Mitak., ch II, sec. II, pl. 6.

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of *gotrajas* in the collateral lines who are postponed to their husbands. Vijnyanesvara, after providing for the great-grandmother, great-grandfather, and their sons and issue concludes:—"In such a way do *samanagotra-sapindas* to the seventh degree take the property."(1) He no doubt intends to lay down a general rule; but what the precise scope of the rule is, it is not possible to say with certainty; and that the whole subject has been a puzzling one to the native law-writers, is evident from Colebrooke's note.(2) We may observe that by using the word "*somanagotra*" in indicating the continuation of the line of succession, Vijnyanesvara would most certainly indicate "persons connected by *gotra*." In pl. 3 he says: "*Gotraja-sapindas*, *i.e.*, the grandfather and the like, take the estate; the *binnagotra-sapindas* (*i.e.*, of a different *gotra* or family) are included in the term *bandhus*." There cannot be much doubt, therefore, that he may have intended to rank as *gotraja-sapindas* not only persons born in the family, but all included in the family. A woman on marrying quits her own *gotra* for that of her husband,(3) and she would thus in her husband's family fall within the class of *gotrajas* as understood by Vijnyanesvara. Still though the term, as he understood it, would include a widow, it is possible that he may have had only the male *gotrajas* in view; his omission to provide expressly for the widows of any collaterals is an argument that he did not intend to include them, and he could not have been unaware that their rights were not universally admitted. On the other hand, it must be remembered that the commentators wrote almost exclusively for their own schools. Vijnyanesvara's rules for the inheritance of the widow and to her property show that he identified the wife with her husband and his family more closely than the doctors of other schools. He really accepted the proposition that "of him whose wife subsists, one-half the body survives"(4) as a basis for actual practice. The school of the Vajasaneyins, or followers of the White Yajurveda, may be regarded as specially favourable to women. The famous dialogue

(1) Mitak., ch., II, sec. V, pl. 5, 6. (2) *Ibid.* note 5.

(3) Steele on Hindu Law and Custom, p. 27, note. 1 West and Bühler 233, Q. 3, p. 231, note.

(4) Vrihaspati in Cole. Dig., bk. V, ch. VIII, pl. 399, and see Manu, IX, 45.

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ascribed to Yajnavalkya with Maitreyi[1] points to a division by that sage of his property between his two wives when he was himself retiring from the world; and Katyayana's Srauta Sutra, the only one on the White Yajurveda, allows to women, though not to cripples, the right of sacrifice as authorized by the Vedas.[2] Visvesvara, the author of the Subodhini, the chief commentary on the Mitakshara, says that "*gotraja*" may properly be taken to include both males and females;[3] and Balambhatta, insisting on the same view, applies it to the determination of the right of a predeceased son's widow, whom he places next after the paternal grandmother. There is a pervading partiality towards female claims in Balambhatta's Commentary which had led to a strong suspicion that it was composed by a lady;[4] but Colebrooke in the preface to his translation of the Mitakshara speaks of it in terms of commendation.[5] The Vira Mitrodaya argues elaborately, as it would seem, for the right of uncles' widows to succeed as the necessary result of a construction of Yajnavalkya's text according to the doctrines of Vijnyanesvara, in opposition to the narrow rules of the Smriti Chandrika (ch. XI, sec. V) and the Daya Bhaga (ch. XI, sec. VI, pl. 10), though, for the author's own part, he is disposed to accept the general rule of the exclusion of females as applicable to the *gotrajas*. In this he departs from the Mitakshara, as in the passage at 2 West and Bühler 100, where the Vedic text of disqualification is cited, and Manu misquoted in support of it.

Upon the whole it would appear more probable than not, upon the text of the Mitakshara, and its recognized exponents, that it did intend widows to be included amongst the *gotrajas*, and that the particular place which it assigns to the female *gotrajas* in the ascending line relatively to their husbands is not an argument of much weight against this, as it is probably due only to a rather fanciful analogy which did not influence the author in determining their right to admission. The point, however, is one that admits of infinite controversy so far as the text is concerned, one, therefore, in which actual practice is of the greatest weight in

(1) Müller H. Sanskrit Lit. 22. (2) Müller H. Sanskrit Lit. 199, 349.
(3) 1 West and Bühler 146. (4) 1 West and Bühler, Intro. 5.
(5) Stoke's Hindu Law, p. 177.

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determining which of the conflicting explanations is to be preferred to the others, according to the principles laid down by the Privy Council in the case of *The Collector of Madura* v. *Mootoo Ramalinga Sattrapathy*.(1)

In the case at 1 West and Bühler, 163, the sastri, recognizing the sister-in-law of the *propositus* as a *gotraja-sapinda*, yet adds that she is "not a *sapinda* in the fullest sense of the word," and consequently postpones her to a first cousin. What he meant by "the fullest sense of the word" *sapinda*, it is not easy to say, and as he quoted no authorities that were applicable, no light can be gathered from that source. Probably he meant that though *gotraja-sapindas* according to one system, that of the Mitakshara, they would not be so according to the other, by which the cousins, as givers of oblations to the ancestors of the *propositus*, would render a benefit that the sister-in-law could not confer. At page 171, however, of the same work the sister-in-law is given precedence (Q. 3) over a distant cousin, and even (Q. 2) over a first cousin of the *propositus*.

The answer to Q. 3 at p. 173 gives to the widow of the paternal uncle of the *propositus* precedence over the second cousin of his father, *i.e.*, the great-grandson of the great great-grandfather of the *propositus*. And thus recognized as a *gotraja-sapinda*, she, of course, takes, as stated at the same page (Q. 2), before the maternal uncle, *i.e.*, a *bandhu* of the *propositus*. The Vira Mitrodaya says that logical consistency would have bound Jimuta Vahana also to assign her a place next to her husband.

At page 174 it is laid down that the widow of a first cousin of the *propositus* is an heir, and even the widow of a second cousin.

The Mitakshara directs that on the death of a widow, failing specified heirs, a successor is to be sought amongst the *gotraja-sapindas* of her deceased husband.(2) The cases of inheritance to a widow thus serve to indicate in several instances who were regarded by the sastris as the husband's nearest *sapindas*. At 1 West and Bühler, 231, the husband's sister-in-law is preferred as heir to his widow before his sister's son, on the express ground

(1) 13 Moo. I. A. 435 to 438.

(2) Mitak., ch. II, sec. XI, pl. 9, 11, 25.; 1 West and Bühler 212; *Viziá-rangam* v. *Lakshman*, 8 Bom. H. C. Rep. 261; 11 Moo. I. A. App. 175.

that the sister-in-law is a *gotraja-sapinda* in virtue of which she ranks before the mere *bandhu*. The sastri's note to his answer in this case has not been translated with sufficient explicitness. It explains that a woman by marrige is born into her husband's family, and thus ceases to be a *gotraja*, though she remains a *sapinda* of her own blood relations. At p. 219, there being two widows of half-brothers, on the death of one of them the mother-in-law, still surviving, was preferred to the other half-brother's widow, but the sastri does not exclude the latter from the line of inheritance. At p. 238, cousins, six or seven removes distant, are pronounced heirs of a cousin's widow as being her *sagotra-sapindas*.

At 1 West and Bühler 115 (Q. 3) the sastri gives the daughter-in-law of the *propositus* precedence over the daughter's son. This is wrong, seeing that the daughter's son is expressly provided for by Mitak, ch. II, s. III, pl. 6; but it shows that the sastri regarded the daughter-in-law's position in the line of heirs as unquestionable, and her place could only be that of a *gotraja-sapinda*. The sastri at p. 169 cites Manu IX, 187, in support of her right. Similarly, at p. 133, the sastri does not exclude her, though he says she "cannot be heir while there is a nephew alive," as in 2 Macn. 75, a nephew being one of the series of heirs specially enumerated. Colebrooke, at 2 Str. H. L. 234, shows that the Vaijayanti prefers the daughter-in-law to the daughter.

The decided cases in the superior Courts bearing on this question are but few in number, and the reports are generally uninforming. In the case reported in 2 Borradaile 557, a daughter-in-law is preferred to a daughter's sons. The Broach sastris would have postponed her, because she was childless, a bad reason for what was probably a correct opinion, the Bengal law[1] not being in force in this Presidency. In *Roopchund* v. *Phool-chund*[2] the daughter-in-law is preferred even to a separated brother of the *propositus*, a decision which only serves to show that she was regarded as a possible and near heir, though by people very inattentive to the law on which they delivered official opinions. A grandson's widow, preferred by the Sadr Court of

(1) Daya Bhaga, ch. XI, sec. II, pl. 3. (2) 2 Borr. 670.

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Bengal to a son's daughter,[1] was by the Sadr Court of Bombay postponed to a daughter's son (Select Rep. 132, 1st edn.), but without any denial of her right of inheritance.

In the Agra Sadr Reports for 1862, at p. 306, there is a case where, under the Mitakshara, the widow of a cousin was prefered to the male descendants of a long-severed branch. That case might be regarded as on all fours with the present one; but the sastri has either given an irrelevant reason, or else the case has been so ill-reported as to considerably impair its authority.

Lastly, we have the case of *Lakshmibái* v. *Jayrám Hari*[2] in which the widow of a collateral was preferred to a male collateral in a branch parting from the common stock at one step further from the *propositus*. If this case was not wrongly decided, it must be taken as conclusive of the rights of widows of *gotraja-sapindas* to succeed next in order to their deceased husbands representing collateral lines according to the law of the Mitakshara. Seeing how uniformly, as cases have arisen, the Hindu law officers have construed the Mitakshara as admitting the widows, it cannot, we think, be said that that case was wrongly decided. The recognition of the widows of *gotraja-sapindas* as themselves *gotraja-sapindas*, however slender the basis on which it originally rested so far as collaterals are concerned, has become a part of the customary law[3] wherever the doctrines of the Mitakshara prevail, and the Courts must give effect to it accordingly. Whether, indeed, the widow of a collateral should take before the son or grandson of the same man may admit of question. The mother of the *propositus* takes before her son or grandson, and a like precedence is assigned to his grandmother and great-grandmother; but brothers' wives, on the other hand, are not mentioned between brothers and their sons in Yajnavalkya's text, nor has Vijnyanesvara found a special place for them or for a descendant's widow as he has for the daughter's son. Although, therefore, a woman, become a member of her husband's family, takes the benefit of a rule resembling that of the Roman law ("*jurisconsultus cognatorum gradus et adfinium nosse debet*:" Dig. Lib. 38,

(1) 7 B. S. D. A. Rep. 59. (2) 6 Bom. H. C. Rep. 152 A. C. J.

(3) Manu II 12, VIII 46, Yajnyavalkya I 7 Apastamba Samayachárika Sutra Ad init; *Bhau Nanaji* v. *Sundrabai*, 11 Bom. H. C. Rep. at p. 266

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t. 10, s. 10), yet as in that law the widow's right of inheritance was limited and of late introduction, the "gradus" applying, in strictness, only to blood relations, so analogy may be thought to lean somewhat to the preference of the eldest surviving male as representative of any branch to the widow of any collateral in the same line; but the point cannot be finally decided until it arises in the proper form. It is enough for the purposes of the present case to say that a widow in a nearer collateral line has precedence, according to the Mitakshara, over a male in a remoter line.

The Mitakshara is the leading authority on the Hindu law of inheritance for this Presidency, but it is subject [see *Viziárangam* v. *Lakshman*(1) and *Krishnáji* v. *Pándurang*(2)] to an exception in the island of Bombay, where the doctrines of the Vyavahara Mayukha predominate. It must be seen, therefore, whether, on the point we are considering, the Vyavahara Mayukha makes a provision different from that of the Mitakshara.

As regards the capacity of women to inherit, the two works agree. Nilakantha says that the paternal grandmother is the first amongst the *gotraja-saipndas*;(3) and this is in accordance with his adoption in the Sanskara Mayukha (M. S. 44) of Vijnyanesvara's theory of the *sapinda-relationship* as arising from blood or bodily connexion rather than from sharing in common oblation. He also admits the sister;(4) and this, again, denotes his acceptance of women's heritable capacity as a leading principle. But it also takes him aside altogether from Vijnyanesvara's line of succession. According to the Mitakshara, "*gotraja*" is equivalent to "*samana-gotra*" (*i.e.*, connected by *gotra*); and a sister who by marriage had passed, or was to pass, of necessity, into another *gotra* would be postponed to all within the *gotra* of the *propositus*. Nilakantha says "*gotraja*" means "born in the *gotra*," and that after the specified heirs the sister takes as the nearest to the *propositus*. In this interpretation of "*gotraja*" he agrees with Devanda Bhatta, the author of the Smriti Chandrika, but the latter limits the term, as we have seen, to males. Having thus admitted the

(1) 8 Bom. H. C. Rep. 244 O. C. J.
(2) 12 Bom. H. C. Rep. 65. (3) Vyav. Mayukha, ch. IV, s. VIII, pl. 18.
(4) Vyav. Mayukha, ch. IV, s. VIII, pl. 19.

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father's daughter as a *gotraja-sapinda*, it would have been a logical extension of Nilakantha's doctrine to admit the grandfather's daughter and the daughters of other ascendants next after males in the same degree. They are all born in the *gotra*, and, therefore, according to his reasoning, *gotraja-sapindas* entitled to take according to their propinquity. Messrs. West and Bühler say :[1] "At all events he would place the daughters of male *gotraja-sapindas* amongst the heirs bearing this name." Yet it does not, on full consideration, seem possible to maintain with confidence this induction from the single instance given by the author. On failure of the sister, Nilakantha says,[2] the grandfather and half-brother are to inherit together; and then, without making any provision for the grandfather's daughter, he proceeds to the great-grandfather, the uncle and the half-brother's sons. The introduction of the sister as a *gotraja-sapinda* is thus counterbalanced by the omission of the paternal aunt, and we are thrown back on the[3] preceding placitum for such guidance as it may afford in determining generally what females rank or not as *gotraja-sapindas*.

Nilakantha, while he admits the paternal grandmother, makes no provision for the paternal great-grandmother by his subsequent arrangements; if they are to be considered as in any way exhaustive he rather implicitly excludes her. Yet, being able to provide for the paternal grandmother apart from all *gotraja* connexion by means of Manu's text in her favour, he has chosen to rank her amongst the *gotraja-sapindas*. She does not, like the great-grandmother in the Mitakshara, rest on this connexion, and this alone, for her place in the line of inheritance; but being designated a *gotraja-sapinda*, and being so only in virtue of her marriage, it follows of necessity that Nilakantha thought that marriage as well as birth created the *gotraja* relationship. This might lead to absurd results as women, inheriting in two families, while men inherited only in one, might gradually absorb all the property; but, as we have seen, the blood *gotra-ship* of women cannot safely be extended beyond the sister. The admission of the paternal grandmother stands as the sole indication of the recognition of

(1) 1 West and Bühler 148.
(2) Vyav. Mayukha, ch. IV, s. VIII, pl. 20.
(3) Vyav. Mayukha, ch. IV, s. VIII, pl. 18.

wives and widows in the family as *gotrajas;* and this itself is met by a disposition apparently excluding or suggesting the exclusion of all females more remote than the paternal grandmother.(1)

Thus, if the foundation of the rights of widows of *gotrajas* under the Mitakshara is slender, under the Mayukha it may be called almost shadowy. No widow of a collateral is expressly provided for; the only wife of an ascendant expressly admitted is one for whom there is a special text. It might be supposed that the native jurists would have found it impossible to admit the widows of collaterals to the rank, under such a law, which they have been assigned under the Mitakshara, yet they seem not to have thought the difficulty at all insuperable. It is to be observed that the rule for equal distribution of the property amongst remote relations of the *propositus*(2) standing at an equal distance from him appears to have been wholly disregarded in practice. No instance of its application is to be found amongst the cases collected by Messrs. West and Bühler, nor has any claim by coheirs, as far as our experience goes, ever been based upon it. Nilakantha's speculative suggestion in placitum 20 has not then, by its accordance with, or adoption into the customary law, become a binding rule. The pandits perhaps, like Mr. Colebrooke,(3) could not make out what it would lead to, and, therefore, even while professing a general allegiance to the Vyav. Mayukha, adhered to the older rule of the Mitakshara, except where this was qualified by so clear and specific a modification as that in favour of the sister.

That the native authorities have considered the Mayukha to have adopted the Mitakshara doctrine with the exception we have indicated, or else themselves declined to follow the Mayukha any further in its divergence from the older standard, is made clear by the cases to which we have referred. For most of the replies given by them, the sastris cite the Vyavahara Mayukha along with the Mitakshara, as at 1 West and Bühler 238. If the Mitakshara is cited alone in support of a female *gotraja's* claim as at 1 West and Bühler 171, 174, the Mayukha alone is in other

(1) Vyav. Mayukha, ch. IV, s. VIII, pl. 20.
(2) Vyav. Mayukha, ch. IV, s. VIII, pl. 20.
(3) Mitak., ch. II, S. V, pl. 5, note.

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instances cited for the same purpose.[1] In the case at 2 Borr., 557, evidence was given of custom amongst the Oodich Brahmans having assigned precedence to the daughter-in-law over the daughter's son. In the case at p. 670 the daughter-in-law was assigned precedence over the surviving half-brother. The half-brother, according to the Mayukha, stands at a much greater distance from the *propositus* than the brother of the full blood; but still, being assigned a definite position side by side with the grandfather, he could not be postponed to the daughter-in-law, who is not expressly named, unless the daughter-in-law were deemed entitled to precedence as a *gotraja* according to her propinquity. The Mayukha is not expressly cited for this case, but the parties residing in Guzerat; it may be supposed to have governed the sastri and the Court. It was either supposed to have recognized female *gotraja-sapindas* made such by marriage, or else was not accepted as determining the law.

It results from this investigation that, although the Mayukha's acceptance of Vijnyanesvara's doctrine is so slightly indicated, yet it is on the understanding of this acceptance that it has itself been accepted. Its provision in favour of the sister has been received into the common law, but in other respects it has been reduced to harmony with the Mitakshara. It is quite conceivable that a different construction should have found recognition in the island of Bombay, that the provision for the sister should have been taken as an indication of the rule to be generally followed with respect to females born in the family, that females entering the family should not be recognized as thereby acquiring rights of inheritance, and that males equally remote by ascent or descent, or both, should take together. If such a construction had become a part of the living law of the place, we should be bound to give effect to it; but no evidence of a customary interpretation of the Mayukha, different from what prevails elsewhere, has been laid before us. It is not likely that any difference should exist, for the population that has poured into Bombay from the neighbouring country would naturally bring with it its own customary law, and particular text books, with no other construction and no more binding authority than that customary law assigned to them.

[1] 1 West and Bühler, 115, 170, 171, 174.

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It is to be regretted that we should have to deal with important civil rights by reference to principles which almost elude our grasp when we endeavour to give them a practical application; but we must, in matters of inheritance, administer to the Hindu community such a law, however vague and nebulous, as it has been content to devise for itself, or to accept from tradition. By that law the widow of the *gotraja-sapinda* of a nearer collateral line appears entitled to precedence over the male *gotraja* in a more remote line, and we must accordingly pronounce against the claim of the plaintiffs.

Appeal dismissed.

Attorneys for the plaintiffs:—*Messrs. Tyabji and Sayâni.*

Attorneys for the defendants:—*Messrs. Hearn, Cleveland, and Lee-Warner.*

[ORIGINAL CIVIL.]

Before Mr. Justice Pinhey.

MIRZA ALLY BEBANEE (PLAINTIFF) *v.* SYED HYDER HOOSEIN (DEFENDANT).*

1878 February 19.

Practice—Setting aside ex parte decree—Substituted service of summons.

Where substituted service of the summons is ordered under section 82 of the Civil Procedure Code (X of 1877), a sufficient time ought, under section 84, to be given for notice of the fact to reach the defendant, wherever he may be; and, if an *ex parte* decree be obtained by the plaintiff, the Court, on being satisfied that the time fixed was insufficient, will set aside the decree.

THIS was an application by the defendant, under section 108 of the Civil Procedure Code (Act X of 1877), to have a decree against him set aside, and the suit restored to the Court list.

The summons in the suit was issued on the 24th January, and the day fixed for the hearing was stated in the summons to be the 12th February.

On the 4th February an order to substitute service on the defendant was obtained by the plaintiff from a Judge in chamber, under section 82 of the Civil Procedure Code (Act X of 1877), and on the same day service was duly effected as required by that section.

On the 12th February the case came on for hearing. The defendant did not appear, and an *ex parte* decree was accordingly

* Suit No. 23 of 1878.

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passed against him under section 100 of the Civil Procedure Code.

On the 15th February the defendant obtained an order *nisi* to set aside the decree upon an affidavit in which he stated that he had left Bombay, four months previously, for the purpose of visiting his native place, Moradabad, in the North-West Provinces, that before his departure he had informed the plaintiff of his intention. He denied that he had absconded in order to avoid this suit, of which he alleged he knew nothing whatver until his return to Bombay on the 13th February, when he learned that an *ex parte* decree had been obtained against him by the plaintiff.

Badrudeen Tyabji, for defendant, in support of the order:—The mere fact that the plaintiff was not in Bombay does not show he had absconded. Section 84 of the Civil Procedure Code requires the Court to fix a time for defendant's appearance when making an order to substitute service. This order does not show that this was done, and is, therefore, irregular. The substituted service was not effected until the 4th February. Time should have been allowed to enable the defendant to hear that service had been effected, and to attend at the hearing. He swears he was at Moradabad, which is four days' journey from Bombay. He could not possibly have attended the hearing on the 12th February. These circumstances made it only reasonable that when the order to substitute service was made, a new date for the hearing should be fixed under section 84 of the Code. That section was evidently intended to meet such a case as this.

Inverarity, for plaintiff, *contra*:—This Court cannot go behind the order made in chamber for the substitution of service which was made on affidavits believed by the Judge. As to section 84 of the Code, the date fixed need not appear in the order. The Judge ordered that this summons should be affixed to the door of the defendant's house. This summons orders the defendant to appear on the 12th February. That therefore was the date fixed by the Judge under section 84. If no new date for the hearing was fixed, we must assume that the Judge did not think it necessary, and that he considered all the circumstances of the case.

This Division Court is really asked to set aside the decree on the ground that the order to substitute service should not have

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been made. By section 83 of the Code the Court must hold that the defendant was personally served on the 4th February. He could, therefore, have been present in Court on the 12th February, even if he had been at Moradabad on the 4th. We don't believe the defendant was at Moradabad; and we now apply for leave to cross-examine the defendant on this point.

PINHEY, J.:—By the first clause of section 108 of the Code of Civil Procedure an application may be made to set aside a decree passed *ex parte* against a defendant under section 100, and by the second clause of the section it is provided that 'if it be proved to the satisfaction of the Court that the defendant was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall pass an order to set aside the decree.' In the present case I am satisfied that the defendant was prevented by sufficient cause from appearing when the suit was called on for hearing on the 12th February. The defendant has sworn in his affidavit in support of the application that he was not in Bombay when the plaint in this suit was filed on the 21st January last, as he went, four months ago, to his native place, Moradabad, in the North-West Provinces, for the recovery of his health, or, at least, for change of air. And it seems from the plaint that the plaintiff was uncertain of the whereabouts of the defendant, even if he did not know that the defendant had gone to Moradabad; for in the plaint he does not describe the place of present abode of the defendant in any way as contemplated by paragraph (c) of section 50; but he describes the defendant as 'a Mahomedan inhabitant *who lately resided in house No.* 5, in Ghás Bazaar Street, outside the Fort of Bombay.' On the plaint being filed, containing this description of the defendant, the summons issued in the usual way; and when it was certified to the Court that the defendant was not to be found at the place of last residence mentioned in the plaint, an order for substituted service was taken out in chamber on the 4th February. On that day substituted service of the summons was effected by affixing a copy to the door of the house specified in the plaint.

Section 83 of the Code of Civil Procedure provides that "the service substituted by order of the Court shall be as effectual as if it had been made on the defendant personally." Mr. Inverarity

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argued that under this section the Court is bound to hold that the summons was served on the defendant personally in Bombay on the 4th of February; and as there was plenty of time for a defendant served in Bombay on the 4th to appear in Court on the 12th, Mr. Inverarity contended that the Court could not consider that the defendant was prevented by any sufficient cause from appearing at the hearing in Court on the 12th. But I am not prepared so to interpret section 83. Substituted service is made by that section as effectual as personal service: but what does "effectual" mean? Merely effectual for proceeding with the suit, and nothing more. It does not and cannot mean that substituted service on a man's house in Bombay is equivalent to personal service on that date; nor does it imply the absurd consequence that a man who happened to be shooting in Central India had personal knowledge of what was done at his house in Bombay on the day substituted service was effected. And that no such unreasonable interpretation of section 83 was contemplated is clear from the next section 84, which provides that "whenever service is substituted by order of Court, the Court shall fix such time for the appearance of the defendant as the case may require." This section shows that, although substituted service may be ordered in Bombay, the Court is to take into consideration the time necessary for notice of the fact being conveyed to the place where the defendant really is, even if he be in America. Therefore, reading section 83 with the second clause of section 108, I have no doubt that the Court can, in such a case as this, hold that, as there is reasonable ground for believing that the defendant was at Moradabad and unaware of the existence of this suit, and, therefore, prevented from appearing when the case was called on for trial, the defendant is entitled to have the *ex parte* decree passed against him set aside, and to be allowed to make such defence to the suit as he may have. I, therefore, order (under section 108) that the decree passed in this suit on the 12th February be set aside. I make no order as to the costs of this application at present. They will best be considered when the suit is heard. When the suit is tried on its merits in the presence of both parties, it may be found that plaintiff improperly tried to snatch a decree behind defendant's back, or it may be found that the defendant was absent from Bombay because his creditors had made further

residence here impolitic. The latter supposition is, however, hardly reconcilable with his return since the 12th February.

Decree set aside.

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Attorney for the plaintiff :—*Mirza Hoosein Khan.*

Attorneys for the defendants:—*Messrs. Fletcher and Smith.*

[ORIGINAL CIVIL.]

Before Sir Charles Sargent, Kt., Justice, and Mr. Justice Bayley.

L. A. WALLACE AND OTHERS (PLAINTIFFS) *v.* F. G. JEFFERSON (DEFENDANT).*

February 15.

Practice—Inspection—Act X of 1877, *Section* 130.

Under section 130 of the Civil Procedure Code (X of 1877), a Judge has no discretion to refuse to allow inspection of documents relating to matters in question in a suit, provided they are not privileged.

Confidential communications between principal and agent, relating to matters in a suit, are not privileged.

Held, in a suit for an injunction to restrain the defendant from using certain trade marks, that telegrams and letters between the plaintiffs' firm in London and their managing agent in Bombay, relating to the subject-matter of the suit, were not privileged.

Bustros v. *White*(1) and *Anderson* v. *Bank of British Columbia*(2) followed.

IN this suit, which was filed on the 8th November 1877, the plaintiffs prayed to be declared entitled to the sole and exclusive use of certain trade marks described in the plaint, and sought an injunction against the defendant to restrain him from using the same.

The plaintiffs were a firm carrying on business in London under the name of Wallace Brothers, and had branch firms in Manchester and Bombay. The defendant was a merchant in Bombay, carrying on business under the name of King & Co.

The plaintiffs refused to give the defendant inspection of certain documents relating to the subject-matter of the suit, and con-

* Suit No. 717 of 1877.

(1) L. R. 1 Q. B. D. 423. (2) L. R. 2 Ch. D. 644.

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sisting of telegrams and correspondence which passed between the Bombay firm and the firms in London and Manchester, on the ground that they were "private documents written in contemplation of litigation or after litigation had commenced." A summons in chambers was obtained by the defendant, requiring the plaintiffs to show cause why inspection should not be given, and the matter was adjourned into Court for argument. In a supplemental affidavit filed by Mr. Richardson, the agent of the plaintiffs' firm in Bombay, the nature of the documents in question was stated as follows:—

1. "The memorandum of the 29th September 1877 (from the firm in Bombay to the firm in Manchester) states the opinion of the writer with regard to a part of the subject-matter of this suit and some observations on the course to be adopted.

2. "The telegram of the 24th October 1877 (from the firm in London to the firm in Bombay) contains instructions as to legal proceedings to be instituted against the defendant.

3. "The letter of the 26th October 1877 (from the firm in Manchester to the firm in Bombay) confirms the telegram mentioned in the last paragraph, and contains instructions with regard to the proceedings to be instituted; and all the other letters and telegrams referred to in the schedule contain instructions with regard to this suit, or advice and observations on the course to be pursued with reference to the subject-matter of the suit, or advice with regard to the evidence to be obtained for this suit, or reports of proceedings already had in this suit.

4. "None of the said documents contain any information or statement of fact relating to the subject-matter of this suit, save information and facts communicated expressly for the purpose of being used by the plaintiffs in this suit, and information with regard to the proceedings already had in this suit, and which last-mentioned information is known to the defendant as well as to the plaintiffs."

Lang, for the plaintiffs, showed cause:—The defendant does not allege that these documents contain anything material to his case. The Court requires some evidence of this. The defendant

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has no right to an inspection merely for the purpose of fishing for information which may possibly be useful to him. The fact that the documents relate to the suit does not show they are material to plaintiffs' case. The rule is given in *Kerr* on Discovery.(1) These documents are privileged. Some of them are communications from the plaintiffs, who reside in England, to the solicitors who are conducting this case in Bombay. No doubt they go through Mr. Richardson, the agent, but they are intended for the solicitors, and so come within the first of the two classes of privilege mentioned by Mellish, L.J., in *Anderson* v. *Bank of British Columbia*.(2) The letters relating to the evidence required at the trial are also privileged; see observation of Mellish, L.J., in the same case.(3) If no documents are protected except those written by or to solicitors, it will be necessary for commercial firms to conduct all private correspondence through their solicitors.

Inverarity for defendant, *contra*:—This is an application under section 130 of the new Civil Procedure Code (Act X of 1877). This section is taken from the English Judicature Act, 1875 (Order XXXI, Rule 11). Under that rule it has been held that the Court has no discretion to refuse inspection, unless the documents are privileged: *Bustros* v. *White*.(4) *Primâ facie*, all documents should be produced. The burden of proof of privilege lies on the plaintiffs. We need not show that the letters contain anything material to our case. It is admitted that they relate to this suit, and that is enough under section 130 of Civil Procedure Code (Act X of 1877).

[SARGENT, J.:—Section 130 gives inspection "if the Judge thinks right."]

Bustros v. *White*(5) shows that these words give the Court no discretion. That case was decided by eight Judges. No privilege is shown here. In *Anderson* v. *Bank of British Columbia*(6) the letter was written for the very purpose of obtaining legal advice, and yet inspection was ordered. That was a stronger case than this.

(1) Page 18.
(2) L. R. 2 Ch. D. 644; see p. 658.
(3) *Ibid.* p. 654.
(4) L. R. 1 Q. B. D. 423, S. C. 45 L. J. Q. B. 642.
(5) L. R. 1 Q. B. D. 423.
(6) L. R. 2 Ch. D. 644; see p. 642.

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Hutchinson v. *Glover*[1] and *English* v. *Tottie* [2] were also cited.

SARGENT, J.:—In *Bustros* v. *White*[3] it was decided by a Court of Appeal consisting of eight Judges that under Order XXXI, Rule 11, of the English Judicature Act, a Judge has no discretion as to refusing to allow the production of documents in possession of a party to the suit relating to the matter in question, provided the documents are not privileged. Section 130 of the Civil Procedure Act of 1877 would appear to have been copied from the above rule, and we think, therefore, it is advisable to adopt the English ruling as to its construction. As the defendant's affidavit admits that the documents in question relate to the matter in dispute, the only question to be determined is, whether they are privileged. They consist of two or three telegrams and letters, all of which passed between the plaintiffs in London and Mr. Richardson, who manages their business in Bombay. It was said that they were confidential communications between principals and their agents. But the mere circumstance that communications are confidential does not render them privileged, as pointed out by the Master of the Rolls in *Anderson* v. *Bank of British Columbia*.[4] They must be, to use his words, "confidential communications with a professional adviser," and this view of the law was confirmed by the Court of Appeal consisting of Lords Justices James and Mellish. Nor would it be possible, having regard to the position in which Mr. Richardson stood to the plaintiffs, to treat him as a deputy of the solicitors in Bombay, even if the plaintiffs had at that time been in communication with professional advisers, which does not appear on the affidavits to have been the case. Lord Justice Mellish in the case of *Anderson* v. *Bank of British Columbia* suggests that the privilege may, perhaps, extend to cases in which an agent, as distinguished from a solicitor, is employed in communicating evidence to be used at the trial. But it is not suggested that the letters from Mr. Richardson were of that nature. The documents, as shown by Mr. Richardson's affidavit, are of the same nature as those of which produc-

(1) L. R. 1 Q. B. D. 139. (2) L. R. 1 Q. B. D. 141.

(3) L. R. 1 Q. B. D. 423. (4) L. R. 2 Ch. Div. 644, 653.

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tion was ordered in *Anderson* v. *Bank of British Columbia*. Production must be ordered. Costs to be costs in the cause.

BAYLEY, J.:—I entirely concur.

Order accordingly.

Attorneys for the plaintiffs:—*Messrs. Craigie, Lynch, and Owen.*

Attorneys for the defendant:—*Messrs. Jefferson and Payne.*

[APPELLATE CIVIL.]

Before Sir M. R. Westropp, Kt., Chief Justice, and Mr. Justice Melvill.

1877. December 12.

SATKU VALAD KADIR SAUSARE (ONE OF ORIGINAL DEFENDANTS), APPELLANT, *v.* IBRÁHIM AGÁ VALAD MIRZÁ AGÁ (ONE OF ORIGINAL PLAINTIFFS), RESPONDENT.*

Obstruction to a public road—Public nuisance—Right of suit—Indian Penal Code (Act XLV. of 1860*), Chapter XIV—Injunction.*

Plaintiffs, who were Mussulmans, sued to establish their right to carry *tabuts* in procession along a certain road to the sea, and alleged that the defendants (also Mussulmans) obstructed them in doing so. The plaint, however, did not allege any personal loss or damage to the plaintiffs arising from the obstruction. Both the lower Courts found, as a fact, that the road along which plaintiffs desired to carry their *tabuts* to the sea was a public road.

Held in special appeal that plaintiffs could not maintain a civil suit in respect of such obstruction, unless they could prove some particular damage to themselves personally in addition to the general inconvenience occasioned to the public. The mere absence of the religious or sentimental gratification arising from carrying *tabuts* along a public road is not any such particular loss or injury as would be sufficient, according to English and Indian precedents, to sustain a civil action.

Authorities as to what constitutes special damage sufficient to sustain a civil suit in such cases referred to.

THIS was a special appeal from the decision of C. B. Izon, Acting District Judge of Ratnágiri, in appeal No. 85 of 1877, reversing the decree of T. Moore, Subordinate Judge of the same place, in original suit No. 957 of 1873.

This suit was instituted by Ibráhim Agá and two others against Satku and fifteen others. The persons, other than those named, did not appear in special appeal.

* Special Appeal No. 230 of 1877.

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The principal question argued in special appeal was whether the action was maintainable.

Shámráv Vithal with *R. S. Tipnis* appeared for the appellant.

Pándurang Balibhadra appeared for the respondent.

WESTROPP C.J.:—The plaintiffs, who are Mussulmans, sue to establish their alleged right to carry *tabuts* in procession along a certain road for immersion in the sea. They aver that the defendants have obstructed them in so doing, and that the Magistrate, at the instance of the defendants, has made an order prohibiting the plaintiffs from using the road for that purpose.

This claim is resisted by the defendants, also Mussulmans, who allege that the road along which the plaintiffs wish to carry their *tabuts* passes through the *mohola* (quarter of the town) of the defendants, and close to their musjid, and that the plaintiffs have no right of way along that road, but that there is another and a public road whereby the sea is accessible to them, which road they have hitherto used for the same purpose.

The defendants also relied upon the law of limitation.

The Subordinate Judge found that the suit was barred by that law. The District Judge reversed his decision, and held that the suit was not so barred.

The present appeal is against that reversal. It is for the appellant contended that not only is the suit barred by lapse of time, but that the plaintiffs have not any cause of action. We deem it unnecessary to decide the question of limitation.

Both of the Courts below have found, as a fact, that the road along which the plaintiffs desire to convey their *tabuts* to the sea is a public road.

There cannot be any doubt that Her Majesty's subjects at large, as well in India as in England, have the right to pass and repass along a public highway, whether it come under the denomination of *regia via* or *communis strata*, [1] so long as they do so peaceably and properly.

(1) As to the various kinds of highway or public passage, see Co. Lit. 56 (a) and *R.* v. *Saintiff*, 6 Mod., pp. 255, 256; S. C. 2 Lord Rymond 1174.

But, speaking generally, no action can, in England, be maintained for a public injury.(1) Therefore, an action does not lie for obstructing a man's passage in a highway, because, ordinarily, he has no more damage than others of the Queen's subjects; but the party causing the obstruction must be proceeded against by indictment. If, however, the person has sustained more particular damage by the nuisance than the public in general, as if any accident occur to him, or he be obliged to go a greater distance and be thereby put to an expense in the conveyance of his goods or otherwise, then he may sue the party causing it. Lord Coke says with his accustomed quaintness: "But here is to be observed a diversity between a private way, whereof Littleton here speaketh, and a common way. For if the way be a common way, if any man be disturbed to go to that way, or if a ditch be made overthwart the way so as he cannot go, yet shall he not have an action upon his case; and this is the law provided for avoiding of multiplicity of suits; for, if any one man might have an action, all men might have the like. But the law for this common nuisance hath provided an apt remedy, and that is by presentment in the leet or in the tourn, unless any man hath a particular damage: as if he and his horse fall into the ditch, whereby he received hurt and loss, there, for his special damage, which is not common to others, he shall have an action upon his case; and all this was resolved by the Court in the King's Bench."(2) For both of these propositions of Lord Coke, authority so early as the Year Books(3) exists. In *Fineux* v. *Hovenden*(4) Lord Coke (then Attorney General), as counsel for the defendant in an action on the case for an obstruction in a street in Canterbury, succeeded in convincing Popham, C. J., Gawdy and Fenner, JJ., in the Queen's Bench in Easter Term 41 Eliz., that "without a special grief shown by the plaintiff the action lies not." There is a general concurrence of authorities that there must be some particular damage to the

(1) See *Robert Mary's Case*, 9 Rep. 113 (a) (Fraser's edn., p. 205); *William's Case*, 5 Rep. 72 (b) (Fraser's edn., p. 145).

(2) Co. Lit. L. I., ch. 8, sec. 68, 56 (a), Har. and But. edn.—See also note (c) in Thomas' edition of Co. Lit., vol. I., 643; *William's Case*, 5 Rep. 73 (a) (p. 145-6 of Fraser's edn.); 5 Bac. Ab. Tit. Nuisance D.

(3) 5 Edw. IV. 2 (b) and 27 Hen. VIII., p. 27.

(4) Cro. Eliz. 664.

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plaintiff more than to the public in order to render the action maintainable. There is, however, some conflict as to what constitutes a sufficient particular damage.

Amongst the instances in which the damage alleged has been held insufficient are the following:—An anonymous case in Moore, p. 180, pl. 321; Easter T. 26 Eliz.; and *Stone* v. *Wakeman*,(1) in neither of which cases does any particular damage appear to have been alleged. *Paine* v. *Patrick*(2) was an action for not keeping a ferry-boat, and no damage was alleged, except that the plaintiff thereby lost his passage across the ferry. There all of the Judges "agreed that a passage over the water was of the same nature as a highway, and that a ferry is for the common good" (Carthew 193)—"And as concerning special damages sufficient to maintain an action on the case, it was resolved that if a highway is so stopped that a man is delayed in his journey a little while, and by reason thereof he is damnified, or some important affair neglected, this is not such a special damage for which an action on the case will lie; but a particular damage to maintain this action ought to be direct, and not consequential; as for instance, the loss of his horse, or by some corporal hurt, in falling into a trench in the highway" (Carthew 194). In *Hubert* v. *Groves*(3) an action for obstructing a highway (Dean Street) by laying several cart-loads of soil and rubbish upon it, and thus impeding the plaintiff, a coal and timber merchant, who had a house in the street, in "enjoying his premises and carrying on his trade in so advantageous a manner as he had a right to do, and by which the plaintiff was obliged to carry his coals and timber, &c., by a circuitous and inconvenient way," Lord Kenyon, C.J., non-suited the plaintiff, being of opinion that "the grievance was not of that description which entitled the party to maintain an action; that it was an injury to the king's highway, a public nuisance, and the party's remedy by indictment only." A new trial was refused by the Court *in banc*.

Amongst the instances in which it has been ruled that a sufficient particular damage has been shown are the following:—

(1) Noy. R. 129; Easter 5 Jac.
(2) 3 Mod. 289; T. C. Carthew 191, 194; Comberbach 180.
(3) 1 Esp. 148.

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Fowler v. *Sanders*, (1) where logs of wood had been placed by the defendant in the highway, and the plaintiff's horse in the evening stumbled, and the plaintiff was thrown to the ground and thereby much hurt—*Everard* v. *Hopkins*, (2) where it was resolved that if a man dig a trench in the highway, and the servant of another fall into it and break his leg, whereby his master loses his services for a long time, the latter shall have an action on the case against him who dug the trench—*Maynell* v. *Saltmarsh*, (3) where the defendant had stopped the highway with posts and thereby prevented the plaintiff from conveying his corn to market, and his corn in his close became "corrupted and spoiled"—*Hart* v. *Bassett*, (4) in which the defendant had stopped up the highway by a ditch and gate, and the plaintiff, a farmer of tithes, was thus prevented from carrying away his tithes along that road, and was compelled to take them by a longer and more difficult way. The court said "that the common rule that no one shall have an action for what every one suffers, ought not to be taken too largely. But in this case the plaintiff had particular damage, for the labour and pains he was forced to take with his cattle and servants, by reason of the obstruction, may well be of more value than the loss of a horse or such damage as is allowed to maintain an action on the case." In *Chichester* v. *Lethbridge* (5) the court followed *Hart* v. *Bassett*, and said that the case before them was stronger in two circumstances; "first, because it is expressly laid that the plaintiff was attempting to travel this road several times with his coach, but could not by reason of these obstructions; secondly, it is also laid that the defendant in person stood and opposed him, and prevented him from removing the obstruction, which by law he might do." *Greasly* v. *Codling*, (6) where the plaintiff, who was in the habit of carrying coals along the road, was by the obstruction delayed for four hours in conveying his coals, and could, on the road which had been stopped by the defendant, perform the journey with coals thee times a day, but not so after by the circuitous route. Best, C. J., in holding a sufficient damage shown, said: "In the case in Carthew (*Paine* v. *Patrick*), (7) indeed, there is an expression

(1) Cro. Jac. 446. (2) 1 Rolle Ab. 88, pl. 5, Hil. T., 12 Jac. 1.
(3) 1 Keble 847, Hil. T. 16 and 17 Car. 2.
(4) Sir T. Jones' Rep. 156, T. T. 33 Car. 2.
(5) Willes 17. (6) 2 Bing. 263. (7) 3 Mod. 289.

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in favour of the defendants, namely, that the action will only lie for a personal injury and not for a mere injury by delay. I cannot see the difference, because injury from the one cause may be quite as prejudicial as injury from the other; but the ground of decision in that case was that no special damage was stated." Burrough, J., said in *Greasly* v. *Codling* there was "an obvious loss of time and profit." Park, J., said that the expressions of the Judges in *Paine* v. *Patrick*, referred to by Best, C.J., were "only put by way of instance," and that the plaintiff in that case "had suffered no particular injury." In *Blagrave* v. *The Bristol Waterworks Company* (1) there was a public footway from a field of the plaintiff to another field of the plaintiff, which the defendants were averred to have obstructed, whereby the plaintiff and his servants, employed in the management of his lands and in tending his cattle, were compelled to go by a longer route, and thereby the work and labour of the plaintiff and his servants were necessarily consumed to a greater extent, and the plaintiff was prevented from employing his servants during such excess as he otherwise would have done, and the tending and feeding of his cattle was rendered more troublesome and laborious and expensive. This was deemed a sufficient averment of particular damage to maintain the action, although the colouring is but slightly higher, and the statement but a little more definite, *Hubert* v. *Groves*, (2) where Lord Kenyon non-suited the plaintiff. *Iveson* v. *Moore* (3) is a leading case of admitted authority. The plaintiff there complained of the stopping up, for a time certain, of a public highway leading to and from his colliery, so that his carts and carriages for carrying coals could not pass, &c., "whereby the plaintiff, for the whole time aforesaid, totally lost the benefit and profit of his colliery; and his coals, dug out of his said colliery, became greatly depreciated and deteriorated for want of buyers, by reason of the aforesaid obstruction, to his damage to the amount of £500." The Court of King's Bench was equally divided on the question whether the action was maintainable—Gould and Turton, JJ., being of opinion in the affirmative, and Rokeby, J., and Holt, C.J., being of opinion in the negative. Gould, J., expressly rested his judgment on the

(1) 1 H. & N. 369. (2) 1 Esp. 148.
(3) 1 Ld. Raymond 486, S. C. 12 Mod. 262.

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ground that a sufficient special damage was shown by the declaration (plaint). The case was afterwards argued by consent of Holt, C.J., before all of the Justices of the Common Pleas and the Barons of the Exchequer at Serjeants' Inn, and, they being all of opinion for the plaintiff that the action well lay, he had judgment. In a note by Mr. Durnford to *Chichester* v. *Lethbridge* (1) it is said of *Iveson* v. *Moore* : " But the Court (the King's Bench) being divided, the matter was reserved for the opinion of the rest of the Judges, who all agreed in the opinion of Turton, J., and Gould, J., that the action lay. The reason the Judges went upon was principally this, that it sufficiently appeared that the plaintiff must and did suffer a special damage more than the rest of the King's subjects by the obstruction of this way ; because it was set forth that the only way to come to the coal-pits from one part of the country was through this way, by which it must be understood without any allegation of loss of customers that the plaintiff did suffer particularly in respect to his trade by the plaintiff's (*quære* defendant's) wrong."

In *Wilkes* v. *The Hungerford Market Company* (2) the plaintiff, a bookseller, having a shop by the side of a public thoroughfare, suffered loss in his business in consequence of passengers having been diverted from the thoroughfare by defendants continuing an authorized obstruction across it for an unreasonable time ; the Court of Common Pleas held that this damage was of a sufficiently particular nature to form the subject of an action. An earlier case, very much resembling that case, was *Baker* v. *Moore*, decided in Hil. T. 8 William III. in the Common Pleas, and mentioned by Gould, J., in *Iveson* v. *Moore* (3). It (*Baker* v. *Moore*) was an action on the case for erecting a wall across a common way at Lambeth, in consequence of which the tenants of certain houses of the plaintiff departed, and the plaintiff lost the profits of his houses, and the Court held that to be a sufficient particular damage to support the action.

These two last-mentioned cases of *Baker* v. *Moore* and *Wilkes* v. *The Hungerford Market Company* cannot, however, any longer be regarded as precedents to be followed, having been over-ruled

(1) Willes 71 ; see p. 74. (2) 2 Bing. N. C. 281, S. C. 2 Scott 446.
(3) 1 Ld. Raymond 486, S. C. 12 Mod. 262.

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by the House of Lords in *Ricket* v. *The Metropolitan Railway Company* (1) on the ground that the damage suffered was too remote—Lord Chelmsford saying: "As far as I have been able to examine the cases, in all of them except two, in which an individual has been allowed to maintain an action for damage which he has specially sustained by the obstruction of a highway, the injury complained of has been personal to himself, either immediately or by immediate consequence. The two excepted cases are those of *Baker* v. *Moore*, mentioned by Mr. Justice Gould in *Iveson* v. *Moore*, and *Wilkes* v. *The Hungerford Market Company*." After describing those cases, Lord Chelmsford continues: "The case of *Baker* v. *Moore* appears to me to be even more doubtful than that of *Wilkes* v. *The Hungerford Market Company*; and, as to this latter case, Chief Justice Erle, in delivering the judgment of the majority of the Judges in the present case (*Ricket* v. *The Metropolitan Railway Company*), observed (2): 'If the same question were raised in an action now, we think it probable that the action would fail, both from the effect of the cases which preceded *Wilkes* v. *The Hungerford Market Company*, and also from the reasoning in the judgment in *Ogilvy* v. *The Caledonian Railway Company*.' (3) In this observation upon Wilkes' case I entirely agree. An endeavour was made by Lord Denman to reconcile that case with the judgment which he pronounced in the case of *The King* v. *The London Dock Company*, (4) but, in my opinion, not very successfully. It is impossible to discover any distinction between the consequential damage which constituted the cause of action respectively in the two cases." Lord Cranworth also said of *Wilkes* v. *The Hungerford Market Company*: "I confess that I have great difficulty in agreeing with that decision—a difficulty which, as I collect from the language of Sir William Erle in delivering the judgment of the Exchequer Chamber in the case now before us, was felt by him and the Judges (Pollock, C.B., Channell and Pigott, BB.) who concurred with him." The facts in *Ricket* v. *The Metropolitan Railway Company*, in which Lords Chelmsford and Cranworth made the foregoing observations, were these:—Ricket was the occupier of a public-house situated by the side of a public footway.

(1) L. R. 2 Eng. and Ir. App. 175.
(2) 5 B. & S. 161.
(3) 2 Macq. Sc. App. 229.
(4) 5 Ad. & E. 163.

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A company obtained powers under certain Acts of Parliament (with which the Lands Clauses Act and the Railway Clauses Act were declared to be incorporated) to make a railway. The company, in carrying these powers into execution, obstructed streets leading to this footway so as to make access to the public-house inconvenient. The obstructions were not permanent, and, after some time, the streets were restored to their original condition. It was found by the jury that there was no structural damage to the premises, but that Ricket had sustained damage in respect to the interruption to his business. The House of Lords (Lord Westbury dissenting), affirming the decision of a majority of the Judges in the Exchequer Chamber, held that, even if the company had not statutory powers to construct the railway, the damage occasioned by the obstruction to the plaintiff's business was too remote to sustain a civil action; and, further, did not come within the purview of the 68th section of the Land Clauses Act, or the 6th or 16th sections of the Railway Clauses Act. The grounds upon which that case was decided were very clearly stated in the Exchequer Chamber by Erle, C. J., (1) thus:—"Here there has been no obstruction to the exercise of the right of way by or on behalf of the plaintiff; neither he himself, nor any one standing in a legal relation to him, such as servant, agent, tenant, or any other legal relation which gives to the plaintiff a legal interest in their use of the way, has been obstructed. But some unknown travellers having a free option to pass from north to south, either by Crawford Passage or any other pass, have chosen some other pass, because they did not like the steps at *Coppice Row;* the plaintiff has no cause of action by reason of any obstruction direct to himself. The travellers who have chosen to turn out of their path to avoid the steps have no cause of action against the defendants in respect of the obstruction; and it seems unreasonable that an obstruction, which created no cause of action either for the plaintiff or for the travellers separately, should, by indirect consequence, become a cause of action to the plaintiff, because the travellers exercised their choice as to their path, and as to their refreshment,—a choice in which the plaintiff had no manner of legal right." Previously, after referring, apparently with approbation, to *Iveson*

(1) 5 B. & S. 160.

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v. *Moore*, (1) *Maynell* v. *Saltmarsh*, (2) *Hart* v *Bassett*, (3) *Greasly* v. *Codling*, (4) *Chichester* v. *Lethbridge*, (5) and *Rose* v. *Miles*, (6) to which we shall presently again advert, he had said: "In all these cases the plaintiff was exercising his right of way, and the defendant obstructed that exercise, and caused particular damage thereby directly and immediately to the plaintiff."

In *Winterbottom* v. *Lord Derby*, (7) the plaintiff, in an action for obstructing a public way, proved no damage peculiar to himself beyond being delayed on several occasions in passing along it, and being obliged, in common with every one else who attempted to use it, either to pursue his journey by a less direct road, or else to remove the obstruction. His action was held unmaintainable. Kelly, C.B., said (p. 321):—"But if we were to hold that everybody who merely walked up to the obstruction, or who chose to incur some expenses in removing it, might bring his action on the case for being obstructed there would really be no limit to the number of actions which might be brought," and, again, (p. 322): "Upon the authorities, then, and especially relying on *Iveson* v. *Moore* and *Ricket* v. *The Metropolitan Railway Company*, I am of opinion that the true principle is that he and he only can maintain an action for an obstruction who has sustained some damage peculiar to himself, his trade, or calling. A mere passer-by cannot do so, nor can a person who thinks fit to go and remove the obstruction. To say that they could would really in effect be to say that any of the Queen's subjects could."

The rules applicable to a highway on land are so also to a highway across or along water. We have already mentioned what was said of a public ferry in *Paine* v. *Patrick*,(8) In *Rose* v. *Miles* (9) the plaintiff declared that he was navigating his barges laden with goods along a public navigable creek, and that the defendant wrongfully moored a barge across, and kept the same so moored from thence hitherto, and thereby the plaintiff was prevented from navigating his barges so laden, whereby the plaintiff was

(1) 1 Ld. Raymond 486, S. C. 12 Mod. 262.
(2) 1 Keble 847. (3) Sir T. Jones Rep. 156.
(4) 2 Bing. 263. (5) Willes 71. (6) 4 M. & S. 101.
(7) L. R. 2Ex. 316. (8) 3 Mod. 289. (9) 4 M. & S. 101.

obliged to convey his goods a great distance over land, and was put to trouble and expense in the carriage of his goods over land. This was held by Lord Ellenborough, C.J., Bayley and Dampier, JJ., to disclose such a particular damage as would uphold an action on the case.

It has been said that to support such an action there must be no want of ordinary care on the part of the plaintiff to avoid the obstruction. *Butterfield* v. *Forrester*, (1) *Marriott* v. *Stanley*. (2)

The Indian Courts have adopted the English law on this subject. In *Barodá Prasád Mostáfi* v. *Gorá Chand Mostáfi*, (3) Peacock, C.J., and Mitter, J., held that even a person, who was one of several who had dedicated a road to the public, could not maintain a civil suit, in respect of an obstruction of that road, unless he had sustained some particular inconvenience in consequence of that obstruction. To the same effect are *Bhugeeruth Dáss* v. *Chundee Churn*, (4) and *Raj Luckhee Debiá* v. *Chunder Kant Chowdry*. (5) In *Káhánji Jethá* v. *Manor Chatoor*, (6) the plaintiff complained of the erection, by the defendant, of a step on a public road. The High Court here, on the 5th December 1870, directed an issue as to whether the existence of the step caused such special injury to the plaintiff as to give him a cause of action. It was found in the negative, and accordingly, on the 20th March 1871, Lloyd and Kemball, JJ., dismissed the plaintiff's appeal. In *Gehanáji and others* v. *Ganpati and others*, (7) the plaintiffs complained of the building, by the defendants, of a wall upon land used by all of the villagers as a market and play-ground, and which the plaintiffs alleged to be public. They did not aver any particular inconvenience to themselves beyond what the other villagers suffered. A Division Court here, consisting of Mr. Justice Nánábhái Haridás and one of the members of this Court, affirmed the decrees of the Courts below dismissing the suit.

In the recent Yerangal fishery case, *Baban Mayácha* v. *Nagu Shrávucha* (8) the plaintiffs complained of being obstructed in their

(1) 11 East 60 (per Lord Ellenborough). (2) 1 Scott N. R. 392.
(3) 3 Beng. L. R. 295, A. C. J.; S. C. 12 Calc. W. R. 160 Civ. Rul.
(4) 22 Calc. W. R. 463 Civ. Rul. (5) 14 Calc. W. R. 173 Civ. Rul.
(6) Special Appeal 378 of 1870.
(7) Special Appeal No. 3 of 1875; see note p. 469. (8) I. L. R. 2 Bom. 19.

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exercise, as members of the public, of the right of fishing in the open sea off Yerangal, the defendants having, contrary to the custom of the locality, planted their fishing stakes and nets therein extended so near to those of the plaintiffs as to prevent fish from getting into the nets of the plaintiffs extended on their fishing stakes, which had been fixed previously to those of the defendants, and that the defendants had thus occasioned to the plaintiffs considerable pecuniary loss, viz., to the extent of Rs. (3,000) three thousand. A Division Court here, consisting of Mr. Justice Nánábhái Haridás and one of the members of the present Court, held that to be a sufficient allegation of particular damage to render the plaint *primâ facie* sustainable.

A Court of Equity, when private individuals suffer an injury quite distinct from that of the public in general, in consequence of a public nuisance, will grant an injunction and such relief as may compel the wrong-doer to take active measures to discontinue the nuisance—*Spencer* v. *London and Birmingham Railway Company*,(1) *Crowder* v. *Tinkler*, (2) *Soltau* v. *DeHeld*,(3) *Attorney General* v. *Forbes*,(4) and see the cases cited in 2 Story Eq. Jur., 11th edn., pp. 110 to 114, pl. 923 to 925 *et in notis*.

Although a civil action is not open to a person not sustaining particular damage from an obstruction of a public highway on land or water or other public nuisance, he may, if the circumstances justify it, have recourse to the criminal law: *ex. gr.*, he may charge the guilty party under such section of chap. XIV of the Indian Penal Code as may be applicable to the case; or, if the obstruction has been accompanied by hurt, criminal force, or criminal intimidation, resort may be had to the sections in the same Code applicable to such cases.

We do not, however, gather from the plaint that any personal violence has been inflicted on the plaintiffs by the defendants.

There is not in the plaint any allegation of personal loss or injury to the plaintiffs arising from the obstruction. The mere absence of the religious or sentimental gratification arising from

(1) 8 Sim. 193. (2) 19 Ves. 617.
(3) 2 Sim. N. S. 133, S. C. 21 L. J. Ch. N. S 153.
(4) 2 May. & Cr. 123.

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carrying *tabuts* along a certain public road is not any such particular loss or injury as the precedents, English or Indian, would justify us in pronouncing to be such a damage as would sustain a civil action.

We must, accordingly, reverse the decree of the District Judge, and make a decree for the defendants. The parties, respectively, must bear their costs of the suit and of both appeals. While regretting that they should both be deprived of the pleasure of annually carrying their *tabuts* in procession for immersion in the sea according to their wonted custom, we must counsel obedience to the discreet orders of the Magistrates— issued, no doubt, under section 518 of the Criminal Procedure Code, in order to prevent the occurrence of any riot or breach of the peace, which, so long as the parties are animated with hostile feeling towards each other, is possible, if either party be permitted to indulge in a public ceremonial in a particular quarter of the town objected to by the other. We further advise the parties to come to some mutual understanding on the subject, and we have no doubt that, when they have satisfied the Magistrate that the *tabuts* may be carried peacefully along the public roads, he will withdraw the inhibition which he has felt it necessary to issue.

Decree reversed.

[APPELLATE CIVIL.]

Before Sir M. R. Westropp, Kt., Chief Justice, and Mr. Justice Nánábhái Haridás.

1875. August 12.

GEHANAJI BIN KES PATIL AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* GANPATI BIN LAKSHUMAN AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Public obstruction—Right of suit.

In all civil suits for the removal of a public obstruction the plaintiff must show that he himself has suffered some particular inconvenience or injury resulting from the obstruction.

THIS was a special appeal from the decision of A. Bosanquet, District Judge of Ahmednagar, affirming the decree of Hari Kanhere, Subordinate Judge of Sangamner.

This suit was brought by Gehanáji and four others against Ganpati and two others for the removal of a wall erected by the defendant Ganpati on a piece of land situated at Kolhávádi, in Taluka Sangamner. The plaint stated that the land was public property used by all the villagers as a market place and play-ground, and that some time ago there had been an *otá* thereon which had been used by the villagers as a public seat. The plaint, however, did not allege any special damage or inconvenience to the plaintiffs themselves, beyond that which the other villagers sustained. Ganpati, by whom the suit was principally defended, alleged that the land in question

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was not public property, but on the contrary was his own ancestral property. He also raised technical objection that, if it were public land as alleged by the plaintiffs in their plaint, the suit ought to be dismissed, as it was not brought by all the villagers. The Subordinate Judge held that the plaintiffs alone were not competent to bring the suit upon the allegation contained in the plaint. On the merits, he held the land to be the property of the defendant Ganpati. In appeal the District Judge raised only one issue, viz., whether the plaintiffs alone could bring the action, and decided it in the negative and against the plaintiffs.

The special appeal was argued before Westropp, C.J., and Nánábhái Haridás J., on the 12th August 1875.

Shivshankar Govindrám, for the special appellant, referred to *Jiná, Ranchod* v. *Jodhá Ghelá*, (4) and contended that, according to that ruling, the action could be maintained by his clients alone.

Vishnu Ghanashám, for the special respondent, was not called upon.

WESTROPP, C. J. :—In order to sustain this action, the plaintiffs were bound to show that they themselves had suffered some particular inconvenience by the conduct of the defendants: *Barodá Prasád* v. *Gorá Chand* (2) per Peacock, C. J., followed in *Raj Luckhee Debia* v. *Chandar Kant Chowdhry*. (3) The case of *Jiná Ranchod* v. *Jodhá Ghelá* (4) does not seem to be inconsistent with this. The statement of facts in the report of that case is meagre, but we gather from the argument that some injury to the plaintiff, personally arising from the obstruction complained of, must have been alleged. The plaint in the present case having been read to us, we fail to perceive that any particular injury, resulting to the plaintiffs themselves, is alleged on their behalf: we must, therefore, affirm with costs the decrees of the Courts below which rejected their suit.

(1) 1 Bom. H. C. Rep. 1.

(2) 3 Beng. L. R., 295 A. C. J.; S. C. 12 Calc. W. R. 160 Civ. Rul.

(3) 14 *Ibid.* 173. (4) 1 Bom. H. C. Rep. 1.

[APPELLATE CIVIL.]

Before Sir M. R. Westropp, Kt., Chief Justice, and Mr. Justice Melvill.

December 6.

SHANKARA BIN MARABASAPA (ORIGINAL PLAINTIFF), APPELLANT, *v.* HANMA BIN BHIMA AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Chalvadi, Office of—Disturbance of office—Gratuities received by intruder, Action to recover—Caste question—Regulation II. of 1827, *Section* 21.

Plaintiff was the hereditary holder of the office of *Chalvadi*, or bearer on public occasions of the insignia or symbols of the Lingayet caste of Bágalkot, in the district of Belgaum. No fees, as of right, were appurtenant to that office, but voluntary gratuities might be given to the *Chalvadi*. In an action brought by plaintiff against defendant as an intruder upon his (plaintiff's) office,

Held that the action would not lie, if brought merely for the gratuities as moneys alleged to be received by defendant to the use of plaintiff.

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Held, also, that the plaintiff's claim to be *Chalvadi* of the Lingayet caste at Bágalkot was a caste question, within the meaning of the unrepealed portion of clause 1, section 21, of Regulation II. of 1827.

Sri Sunkar Bharti Swámi v. *Sidhá Lingáyá Charanti* (1) mentioned.

THIS was a special appeal from the decision of E. Hosking, Acting Senior Assistant Judge at Kaládgi, in the district of Belgaum, in regular appeal No. 53 of 1876, affirming the decree of the Subordinate Judge of Bágalkot in original suit No. 847 of 1870.

The plaintiff, Shankara, brought this suit against Hanmá and seven others to establish his right to perform the duties of *Chalvadi*. He alleged that the office had belonged to his family for a long time, but that it had been wrongfully taken possession of by the defendants. He also claimed damages on account of the loss of his income. The Subordinate Judge threw out the claim, on the ground that it involved a caste question. His decision was upheld on appeal. The High Court, on special appeal, however, remanded the case for further investigation. On remand, the Subordinate Judge adhered to his former decision, and the Assistant Judge confirmed it on appeal.

Shántárám Náráyan appeared for the appellant.

Nánábhái Haridás, *Pándurung Bhalibhadra*, and *Mánekshái Jehangirshái* appeared for the respondent.

WESTROPP, C. J.:—The Assistant Judge has found in substance that the plaintiff is the hereditary holder of the office of *Chalvadi*, or bearer, on public occasions, of the insignia or symbols of the Lingayet caste at Bágalkot; but that, though members of the caste may bestow voluntary gratuities on the *Chalvadi*, there are not any fees as, of right, appurtenant to that office. It is therefore clear that an action by the plaintiff against an intruder upon his office, who has been paid such gratuities, if the action be brought merely for moneys received by the defendant to the use of the plaintiff, will not lie—*Boyter* v. *Dodsworth*, (2) *Muhammad Yussub* v. *Sayad Ahmed*, (3) *Sitárámbhat* v. *Sitárám Ganesh*, *per Couch*, *C. J.*,(4) *Vithal Krishna Joshi* v. *Anant Rámchandra*.(5) So far, therefore, as the plaintiff seeks to recover

(1) 3 Moore's Ind. App. 198. (2) 6 Term. Rep. 681.
(3) 1 Bom. H. C. Rep., Appx., xviii. (4) 6 Bom. H. C. Rep., A.C.J., 250, 253.
(5) 11 Bom. H. C. Rep. 6.

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moneys paid to the defendant in his usurped character of *Chalvadi* by members of the caste, this action will fail. Whether, under such circumstances, a plaintiff might recover nominal damages from a defendant in a suit in the nature of an action on the case, and also (except in the case of a mere caste dispute) obtain, under the equitable jurisdiction of our civil Courts, substantial relief by getting an injunction restraining the defendant from further intrusion, is a question of some nicety. It might, perhaps, be contended that an office, unaccompanied by emoluments, fees, or salary payable as of right, is a mere dignity, and, therefore, falls within the scope of the case of *Sri Sunkar Bharti Swámi* v. *Tidhá Linágáy Charanti*,[1] which was a claim by the *Swámi*, or chief priest of the Smartava caste of Brahmans, to the exclusive right of being carried cross-wise on the high road in a palanquin on ceremonial occasions, in virtue of a grant from the ruling power to a predecessor in office. Lord Campbell there said that "in England, although an action may be maintained for the disturbance of an office or franchise, an action could not be maintained by the grantee of a dignity from the Crown against a person who without a grant should assume the like dignity; but it does not necessarily follow that such is the law in Bombay." Their Lordships of the Privy Council then remanded that suit to the Sadar Adálat of Bombay, and directed that Court, in the first instance, to consider whether, assuming the case of the plaintiff there, the *Swámi*, to be true, his action would, by the law of this Presidency, be maintainable. The Sadr Adálat, having taken the case into their consideration, and, in the first instance, assumed the case as stated on behalf of the *Swámi* to be true in fact, held, nevertheless, on the 6th February 1845, that he could not maintain his action—and their decision would appear to have been acquiesced in, and the case was carried no further.[2] Whether the office of *Chalvadi* at Bágalkot—dissociated as it has been found to be from any emoluments receivable as of right—is a mere dignity like the honour claimed by the *Swámi*, and, therefore, not a fit subject for an action against an intruder for his disturbance of the party entitled, is a question on which we do not purpose to

(1) 3 Moore's Ind. App. 198.

(2) See note on next page for minutes of the Judges on this case.

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give an opinion, for we think that the claim of the plaintiff to be *Chalvadi* of the Lingayet caste at Bágalkot is a caste question within the meaning of so much of the first clause of the twenty-first section of Regulation II. of 1827 as remains unrepealed by Act X. of 1861, and prohibits interference on the part of civil Courts in caste questions. The alleged duty of the *Chalvadi* being to carry the insignia of the caste at public ceremonials, without any right to levy fees or receive salary for the performance of that duty, is essentially a matter which concerns the caste exclusively, and, therefore, one which we think the Bombay Legislature intended to leave to the caste.

For these reasons we affirm the decrees of the Courts below, except so far as they relate to costs, and we direct that the parties, respectively, do bear their own costs of the suit and of all of the appeals.

It was not the intention of this Court, when remanding this case in August 1874, to decide whether or not the question involved in it was a caste question. The remand was made simply in order that the facts should be more fully investigated.

Decree affirmed.

NOTE.—

COPY of the Minute recorded by A. Bell, Esq., Puisne Judge of the late Sadr Adálat at Bombay, dated the 6th February 1845, in appeal of *Sri Sunkar Bharti Swami* v. *Sidhá Lingáyá Charanti* on remand by the Privy Council.

Note.—The Privy Council have, in this appeal, passed an interlocutory decree, reversing the Sadr Divani Adálat's decision, and remitting the cause back to this Court, without prejudice to any question in the suit, and directing the Court first to consider and adjudicate whether, supposing the allegations of the appellant to be substantiated by proof, he is entitled by law to maintain this suit, and if this Court is of opinion that appellant is so entitled, then, that there ought to be a new trial by the said Court of Sadr Divani Adálat.

The Privy Council's judgment goes on to say "that the said Court of Sadr Divani Adálat ought to be at liberty to give such direction as to them shall seem fit to the Zillah Court of Dharwar to take evidence in the said suit for the consideration of the said Court of Sadr Divani Adálat, by whom this suit is to be adjudicated.

The decree further directs that the costs, charges, and expenses of bringing this appeal to a hearing be paid by the parties in the following proportions. By appellant the sum of one thousand and ninety-two pounds eleven shillings and five pence, and by respondent nine hundred and fifty-five pounds four shillings and five pence for costs incurred in their behalf respectively.

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The first point for our consideration is whether, supposing appellant possesses the privilege of riding in a palanquin carried cross-wise, he is entitled by law to maintain this suit.

Mr. Greenhill's remarks of the 23rd of February 1838 so clearly express my sentiments on this point that I strongly urge them on the consideration of my colleagues.

Admitting, then, the allegations advanced by appellant to be susceptible of proof, I am not prepared to allow that the appellant is entitled to maintain an action against another who assumes a similar pageantry.

The reigning Government is the authority to whom the appellant should have applied to support him in his rights, and which alone can permit or withhold the use of honours of this and every other kind; but our Courts should discourage as much as possible claims of so unsubstantial and objectionable a nature as the one now brought under consideration. I am, therefore, of opinion that this suit should not be maintained. The costs as set forth in the Privy Council's judgment having been recovered from the parties, no further order is necessary.

Should the above view, however, not be concurred in, it will be necessary, under the provisions of clause 1, section XCI., Regulation IV., 1827, to remand the suit to the Court where it was originally tried, to take additional evidence as to the exclusive right set up by appellant, and to pronounce judgment anew; the jurisdiction of the Sadar Divani Adálat being exclusively appellate, all costs, which may have occurred subsequent to the Privy Council's decision, to be borne by appellant.

COPY of the Minute recorded by W. Simson, Esq., Puisne Judge of the late Sadr Adálat at Bombay, dated the 6th February 1845, in appeal of *Sri Shunkar Bharti Swámi* v. *Sidhá Lingáyá Charanti.*

I am disposed to think that privileges, such as that now claimed by the high priest of the Brahmins, do constitute good cause of action for damages, in case they are infringed by other parties belonging to the same caste or sect; but in this instance I believe the opposite party belongs to a different and a hostile sect; at least, I have always understood that virulent enmity exists between Brahmins and Lingayets; and granting that a Brahmin prelate would have good cause of action against a Brahmin usurping his privilege, I consider it doubtful whether the like ground could be maintained against one of a sect yielding no religious obedience to a priest of a separate order.

Again, besides the question of a Lingayet's subordination or dependence in any matter, spiritual or religious, upon a Brahmin priest (which I am clearly of opinion must be negatived), there remain to be substantiated and defined, *first*, the genuineness and, *next*, the purport and intent of the copper-plate grant brought forward *after* the decision on the original by the Judge.

I should be disposed to question the authenticity of the grant itself; but even granting it to be a genuine deed, it only confers the right of being carried in a palki cross-wise along with other honorary privileges, such as using an umbrella, employing an elephant on state occasions, &c., &c., which any other indifferent person might assume (at least under the present Government) without question or offence. Again, the grant in its terms is not

exclusive, and the Lingayets claim usage for their "Guru," also, in regard to this particular ceremony of the palki carried cross-wise. These points were suggested by Mr. Greenhill on the appeal to the Sadr Adálat, and appear to me to be deserving of great consideration.

The wording of the Judge's decree has been taken hold of by the Brahmin party, and construed into a declaration that the decision was founded on the absence of all *sanad*, or grant, conferring the privilege contended for; but though this circumstance may have been considered a capital defect in the case, and have had great weight with the Judge, yet it is by no means to be inferred that the Court would either have admitted the authenticity of the deed produced afterwards, or have held it to be decisive evidence of the *exclusive* privilege claimed by the Brahmin priest.

Without further information, touching the subordinate condition of Lingayets to the heads of the Brahmin priesthood, I am not prepared to declare at once that in this case the Brahmin priest has not a cause of action, supposing the allegations brought forward in his behalf can be substantiated, and I am of opinion that the case should be remitted for trial anew by the judicial authorities of Dharwar (in the mode suggested by the Privy Council for the guidance of the Sadr Adálat), the evidence already recorded being received, and any new points, such as the authenticity and the purport of the copper grant, the supremacy or otherwise of Brahmin priests over the Lingayet population, the usage contended for during many years past on behalf of the *guru* of the Lingayets, or any other point material to the question, being thoroughly examined and ascertained.

COPY of the Minute recorded by H. Brown, Esq., Acting Puisne Judge of the late Sadr Adálat at Bombay, dated the 6th February 1845, in appeal of *Sri Shunkar Bharti Swámi* v. *Sidhá Lingáyá Charanti.*

This is an interlocutory decree passed by Her Majesty in Council bearing date the 15th of July 1843, wherein the decree of the Sadr Divani Adálat, dated the 23rd of February 1838, has been reversed, awarding costs on appellant and respondent, and the case remitted to the Sadr Divani Adálat without any prejudice to any question in the suit, with directions that the Court ought first to consider and adjudicate whether, supposing the allegations of the appellant to be substantiated by proof, he is entitled by law to maintain this suit. The point, therefore, for our consideration is, whether the cause of action is of such a nature and character that it can be maintained by law in a civil Court, the subject-matter under litigation being to prohibit the respondent from riding in a palanquin carried cross-wise, the exclusive right of such a distinguished privilege, the appellant avers, having been solely conferred on him, and which he has attempted to support by two almost illegible copper-plates alleged to have the same effect as *sanads*. I am of opinion that our regulations do not sanction the recognition of suits of the character of the one remanded for our consideration, and, therefore, I conceive the cause of action cannot be

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maintained by law in our Courts of Civil Judicature. The right of riding in a palanquin, carried cross-wise, conveys with it so much absurdity that, if judgment be required on such matters, a civil Court might be hereafter equally called on to pass a decree on any alleged privilege claimed by a devotee to stand on one leg, or to proceed by prostrations from one temple to another.

Under this view, I consider that the case should not be adjudicated in our civil Courts, and, therefore, I pass my judgment that the case be dismissed. Each party to bear his own costs.

COPY of the Resolution passed by the Judges of the late Sadr Adálat at Bombay, on the 6th February 1845, in the appeal of *Sri Shunkar Bharti Swámi* v. *Sidhá Lingáyá Charanti.*

The Court having considered, as required by the decree of Her Majesty in Council, whether the appellant is entitled by law to maintain this suit, is of opinion that he is not so entitled, and decides to dismiss the appeal, with costs in this Court on the parties respectively.

As this cause appears formerly to have excited considerable ferment in the zillah of Dharwar, the Court resolves to communicate the above decision for the information of the Magistrate, to enable him to take precautionary measures to ensure tranquillity, should such be deemed necessary.

[APPELLATE CIVIL.]

Before Sir M. R. Westropp, Kt., Chief Justice, and Mr. Justice Melvill.

1878
January 9.

SANGAPÁ BIN BASLINGAPÁ (ORIGINAL PLAINTIFF), APPELLANT, *v.* GANGAPÁ BIN NIRANJAPÁ AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Suit to vindicate a right to a mere dignity.

Plaintiff sued for a declaration of his right to take a cupola to a certain temple and to place it upon the car of the idol, and to take a *nendicola* (bamboo) with tom-toms from his house to the temple, and to offer the first cocoanut to the idol at the annual festival held in honor of a certain Lingayet saint.

Held that the suit was not maintainable, as it was brought to vindicate plaintiff's right, not to an office, but to a mere dignity unconnected with any fees, profits, or emoluments

THIS was a special appeal from the decision of E. Hosking, Senior Assistant Judge at Kaládgi, affirming the decree of Rángo Rao Krishna, Second Class Subordinate Judge at Muddebihál.

The facts of the case fully appear from the judgment of the High Court.

The suit was dismissed by both the lower Courts as barred by the law of limitation.

* Special Appeal No. 69 of 1877.

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SANGÁPÁ BIN BASLINGÁPÁ v. GANGÁPÁ BIN NIRANJÁPÁ AND OTHERS.

The principal question argued in special appeal was whether or not the suit was maintainable.

Leith (with him *Ghanashám Nilkanth Mádkarni)*, for the appellant, cited *Náráyan* v. *Bálkrishná.*(1)

The Honourable Ráo Sáheb Vishvanáth Náráyen Mandlik, for the respondents, relied upon *Shankara* v. *Haumá.*(2)

WESTROPP, C.J.:—The plaintiff, a Lingayet, by this suit claims as against the three defendants a declaration of his right (which he alleges to be hereditary) to take a cupola to a Lingayet temple and to place it upon the car of the idol, and to take a *nandicola* (bamboo) with tom-toms from his house to the temple, and to offer the first cocoanut to the idol at the annual festival held in honour of Gangápáyá Máhá Purush, a Lingayet saint. A singular circumstance is, that the second defendant is a Mussulman, and at the bar has been stated to be a species of trustee of the temple conjointly with the first defendant (who is the Lingayet *pujari* of the idol), and to be associated in the trust, because the temple has been built partly on the grave of a Mussulman *pir* or saint. The third defendant alleges the car to have been built at his expense (a disputed fact, not decided in the Courts below), and that he has the right to place the cupola upon it and to offer the first cocoanut to the idol. There would appear to have been a dispute between the plaintiff and the first and second defendants from the years 1860 to 1873 with reference to the plaintiff's alleged rights, and during that time the plaintiff was not permitted by those defendants to exercise those rights. However, on the 31st May 1873, those defendants executed an agreement in which they admitted that the plaintiff had the rights which he claims, and, accordingly, in 1874 he was permitted to exercise them, but was again in 1875 outsted from that enjoyment by the three defendants. The Courts below have held the suit to be barred by the law of limitation (Act IX of 1871, schedule II, article 131); but were it necessary for us to decide that point, we doubt that we could concur in their view; for, even if the plaintiff's rights were in 1873 barred by the adverse possession of the first and second defendants and by interruption, yet those defendants by their agreement of 1873

(1) 9 Bom. H. C. Rep. 413. (2) *Supra*, p. 470.

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had waived any right which they might have acquired against him by lapse of time, and by their own permission he was remitted to his original right in 1874. The third defendant does not appear to have intervened until 1875; so, until then, the plaintiff does not seem to have had any cause of action against him. However, it is unnecessary for us to decide the question of limitation, as we are of opinion that upon another ground this suit is not maintainable. It seems to us to have been brought to vindicate the plaintiff's right, not to an office, but to a mere dignity unconnected with any fees, profits, or emoluments, and that this case, therefore, falls within the scope of the decision of *Sri Sunkar Bharti Swámi* v. *Sidhá Lingáyá Charanti*, [1] which was a claim by the *Swámi*, or arch-priest of the Smartava caste of Brahmans, to the exclusive right of being carried cross-wise on the high road in a palanquin, on ceremonial occasions, in virtue of a grant from the ruling power to a predecessor in office. Lord Campbell there said that "in England, although an action may be maintained for the disturbance of an office or a franchise, an action could not be maintained by the grantee of a dignity from the Crown against a person, who, without a grant, should assume the like dignity; but it does not necessarily follow that such is the law in Bombay." The Privy Council then remanded that suit to the Sadr Adálat of Bombay, and directed that Court, in the first instance, to consider whether, assuming the case of the plaintiff there, the *Swámi*, to be true, his action would, by the law of this Presidency, be maintainable. The Sadr Adálat, on the 6th February 1845, held that, even upon that assumption, the *Swámi* could not maintain his action; and their decision was acquiesced in, no appeal having been made against it.[2] Unless we saw strong grounds for believing that decision to be erroneous, we think that we ought to adhere to the principle involved in it, and we do not perceive any such grounds for disputing the authority of that case. We cannot regard *Náráyan* v. *Bálkrishna*[3] as an authority to the contrary, inasmuch as the question—whether the suit would lie—was not raised either by the pleaders or the Court, and the decision of the Sadr Adálat in the other case was not so much as mentioned by either.

(1) 3 Moore's Ind. App. 198. (2) See note, p. 473, *supra*.
(3) 9 Bom. H. C. Rep. 413.

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Upon these grounds we affirm the decree so far as it dismisses the suit. The first and second defendants must bear their own costs throughout, the plaintiff must pay to the third defendant his costs of the suit and of the regular appeal as directed by the Courts below, but the parties, respectively, must bear their own costs of this special appeal.

Decree affirmed.

[APPELLATE CIVIL.]

Before M. R. Westropp, Knt., Chief Justice, and Mr. Justice Melvill.

1877 December 13.

NARSINBHAT BIN BAPUBHAT (ORIGINAL PLAINTIFF), APPELLANT, *v* CHENAPA BIN NINGAPA (ORIGINAL DEFENDANT), RESPONDENT.*

Undivided Hindu family—Ancestral property—Liability of an undivided Hindu for the debts of his deceased brother.

P, an undivided Hindu co-parcener, died on the 7th August 1874, leaving him surviving, a brother C, and a son N. N subsequently died on the 2nd July 1875. In a suit brought by plaintiff against C, on a bond executed by P as surety for one R,

Held that the family property, which on N's death became vested by survivorship in C, was not in his hands liable for the separate debts of P. or N.

THIS was a special appeal from the decision of W. Sandwith, District Judge of Dharwar, in Appeal No. 37 of 1876, reversing the decree of Gopál Vináyek, Subordinate Judge at Gadag, in Original Suit No. 665 of 1874.

The Subordinate Judge awarded the plaintiff's claim. In appeal, however, the District Judge, after remand, reversed the decree of the first Court on the ground that the defendant Chenápá was not the next heir to the deceased Parápá at the date of the institution of the suit, and that the property in Chenápá's hands was joint family property. The principal question raised in special appeal was whether or no Chenápá was liable for the debts of his deceased brother Parápá to the extent of the latter's share in the family property.

* Special Appeal No. 205 of 1877.

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NARSIN-BHAT BIN BÁPUBHAT v. CHENÁPÁ BIN NINGÁPÁ.

Manekshâh Jehangirshâh appeared for the appellant.

Ghanashâm Nilkanth Nâdkarni appeared for the respondent.

WESTROPP, C.J. :—This is a suit against Chenápá on a bond executed by his brother Parápá as surety for one Rángo. Parápá died on 7th August 1874, leaving a son, Ningangavdá. This suit was instituted against Parápá on the lst December 1874. Ningangavdá died on the 2nd July 1875. Parápá, Ningangavdá, and the defendant Chenápá were at the decease of Parápá, members of an undivided Hindu family. Ningangavdá and Chenápá continued undivided until the death of Ningangavdá. On his death Chenápá became, by survivorship, entitled to the whole of the family property. No separate property belonging to Parápá or Ningangavdá is shown to have come to the hands of Chenápá or to exist. Chenápá, in his written statement filed on the 11th June 1875, objected that Ningangavdá ought to be made a party to the suit, but he never was made a party to it. Chenápá never was personally responsible for the separate debt of his brother Parápá, or nephew Ningangavdá, and the joint family property, which has now, as stated, vested by survivorship in Chenápá, is not in his hands liable for their separate debts, as shown by the authorities quoted in *Udarâm Sitârâm* v. *Rânu Panduji*. The liability of joint family property in the hands of a son or grandson for the debts of the father of the one and the grandfather of the other, is there shown to be exceptional. It is not asserted here that Parápá entered into his suretyship for Rángo for the benefit of the undivided family to which Parápá belonged ; nor is it pretended that he executed any mortgage or gave any other special lien on his share in the family property.

On these grounds we affirm the decree with costs.

(1) 11 Bom. H. C. Rep. 76.

[APPELLATE CRIMINAL.]

Before Mr. Justice West and Mr. Justice Pinhey.

IMPERATRIX *v.* LAKSHMAN SAKHARAM, VÁMAN HARI, AND BÁLÁJI KRISHNA.*

1877 Dec 20.

The Code of Criminal Procedure (Act X of 1872), Sections 466 and 468—Sanction of prosecution by Government or its deputy—Máhálkári—Court of Subordinate Judge—Court of District Judge.

Section 466 of the Code of Criminal Procedure extends to all acts ostensibly done by a public servant, *i.e.*, to acts which would have no special signification except as acts done by a public servant; therefore a *máhálkari* charged with fabricating the proceedings of a case decided before himself, could not be tried on that charge except with the sanction specified in that section.

Paragraph 1 of section 466, which mentions a sanction by Government or its deputy, is intended to apply, at least, chiefly to the cases of persons specially responsible to Government, such as accountants who have failed in their duty, and paragraph 2, which speaks of sanction by Government alone, to persons professing to exercise certain authority, and with that pretext doing an act which is impeached by a subject on the ground of its being wholly unwarranted or of an excess or impropriety of some kind.

A *máhálkari* falls within the class of public servants contemplated in paragraph 1 of section 466; a sanction for his prosecution by the District Magistrate is, therefore, sufficient.

For the purpose of sanctioning a criminal prosecution under section 468 of the Code of Criminal Procedure, the Court of the Subordinate Judge is subordinate to that of the District Judge, notwithstanding that the subject-matter of the litigation in the former Court involves more than Rs. 5,000, and an appeal lies direct to the High Court from the decision of that Court in that matter.

A prosecution commences when a complaint is made, the reception of the complaint being a stage of the judicial proceedings towards conviction.

THE Assistant Session Judge of Poona convicted the first accused, Lakshman, *Máhálkari* of Ambegaon, under sections 193 and 466 of the Indian Penal Code, of having committed forgery and fabricated false evidence; the second accused, Váman Hari, of having abetted Lakshman in the commission of these offences; and the third accused, Bálájì Krishná, of having committed forgery and also of having abetted Lakshman in the offence with which he was charged. The first was sentenced to undergo five years' rigorous imprisonment and to pay a fine of Rs. 1 000, or, in default, to suffer one year's further rigorous imprisonment; the second to imprisonment

* Criminal Appeals Nos. 234, 277, and 278 of 1877.

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for three years and a fine of Rs. 500, or, in default, one year's rigorous imprisonment; and the third to two years and a fine of Rs. 200, or, in default, six months' rigorous imprisonment in addition.

The documents which formed the subject of these convictions were:—

1*st.*—A plaint presented to Lakshman Sakhárám as *máhálkari* by Váman Hari, under the Bombay Act V of 1864, signed and verified by the latter, and dated the 9th of June 1876. The verification bore no endorsement as required by section 5 of the Act; and the plaint had no number.

2*nd.*—A summons addressed to Rádhábái, the defendant named in the above-mentioned plaint, bearing the date the 10th of June 1876, but no number. This document had, on the face of it, an acknowledgment of the service and of the receipt of a copy of the summons purporting to be signed by Rádhábái, and dated the 12th June, in the hand-writing admittedly of Báláji Krishná.

3*rd.*—Proceedings admittedly in the hand-writing of Lakshman Sakhárám, dated the 13th June, consisting of notes of the evidence of Rádhábái and her two witnesses, and a decision by him disposing of the case as *máhálkari.*

4*th.*—A receipt initialled by Lakshman Sakhárám, executed by Váman Hari to Rádhábái's husband.

For the purpose of a defence to a partition suit brought in the Court of the Subordinate Judge of Poona by Rádhábái against Váman Hari, the latter produced a copy of the decision of Lakshman Sakhárám as *máhálkari* and of this receipt or release.

A petition presented by Rádhábái's brother-in-law, Rámchander, led to an inquiry into the conduct of the three accused persons. Accused No. 1, Lakshman, being a *máhálkari,* the District Magistrate of Poona sanctioned his prosecution, and directed that he be "placed on his trial under section 466, Indian Penal Code, or any other section which may seem applicable after further investigation."

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The sanction for the prosecution of Váman Hari and Báláji Krishná (accused Nos. 2 and 3) was refused by the Subordinate Judge, but was granted by the District Judge.

All the three accused were, accordingly, placed on their trial, and convicted.

The appeals were heard by West and Pinhey, JJ.

Gill (with *M. C. Apte*) for Lakshman Sakhárám :—A *máhálkari* in certain matters is invested with the powers of a Judge, and is not removeable from his office without the sanction of Government. Therefore, under section 466 of Criminal Procedure Code, the sanction of Government is necessary. A distinction should be drawn between the first and the second paragraph of this section. The former provides for the sanction of Government, or of certain other authorities therein mentioned, being obtained before the entertainment of a complaint against public servants; the latter enacts that the sanction of Government itself should be obtained before proceeding with their prosecution. This refers to a stage beyond the entertainment of the complaint, and includes the issuing of process. As held in *Regina* v. *Parshrám Keshav*, (1) the Courts have no jurisdiction to commence a prosecution against any class of public servants not removeable from their office without Government sanction, except with the sanction of the Government itself. The sanction given by the District Magistrate is not sufficient. The conviction must, therefore, be quashed.

Kashináth Trimbak Telang (with *Shántárám Náráyan*) for Váman Hari (No. 2), and *Ghanashám Nilkant* for Báláji Krishná (No. 3) :—The trial of Váman Hari and Báláji Krishná is also without jurisdiction, because a larger sum than Rs. 5,000 was in question in the suit before the Subordinate Judge. An appeal would lie from his decision to the High Court, and not the District Court. Under section 468 of the Code of Criminal Procedure, when an offence against public justice is committed before or against a Court, a complaint of it cannot be entertained except with the sanction of that Court, or of some other Court to which it is subordinate. Here the Subordinate Court, on being applied to, specifically refused to

(1) 7 Bom. H. C. Rep. 61 Cr. Ca.

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grant the sanction; and that Court not being subordinate in this matter to the District Court, the sanction given by it is of no avail. The sanction of the High Court should have been first obtained. It is too late for it now to give its sanction.

Hart (with him *Nánábhái Haridás*, Government Pleader) for the prosecution:—As to Lakshman Sakhárám, no sanction is necessary for his prosecution. He is charged under sections 193 and 466 of the Indian Penal Code as a private individual: *Regina* v. *Parashrám Keshav.* (1) If any sanction is necessary, that of the District Magistrate is sufficient: section 466 of Criminal Procedure Code; *Regina* v. *Malhar*, (2) Act III of 1852. The sanction of Government is, at all events, not necessary before the case goes before a Magistrate. A preliminary inquiry must be held before it is found that any sanction is necessary. Even if a sanction were requisite for the proceedings before the Magistrate, still the conviction is saved by sections 33 and 283 of the Criminal Procedure Code.

As to Váman Hari and Báláji Krishná no sanction is necessary for a charge under section 193 of the Penal Code, unless the evidence was actually used before a Court: section 468, Criminal Procedure Code. The offence *against* the Court, referred to in that section means such an offence as is dealt with in section 228 of the Penal Code.

If a sanction is necessary, the District Court can give it instead of the Subordinate Judge: section 468, Criminal Procedure Code; Act XIV of 1869, sections 21 and 22; *Regina* v. *Malhar Rámchandra.* (3) If not, the High Court can give its sanction now. The Subordinate Judge having refused sanction, the District Judge may give it.—See the case of *Dinobundhoo Chuckerbutey.* (4) Sanction may be given at any time: section 470, Criminal Procedure Code. Cites also section 33, Criminal Procedure Code: *Regina* v. *Ramchordás Nathubhai*; (5) the case of *Náráin Náik.* (6)

The judgment of the Court was delivered by

WEST, J.:—In the appeal before us, Mr. Gill, the counsel for

(1) 7 Bom. H. C. Rep., Cr. Ca. 61.
(2) 7 Bom. H. C. Rep., Cr. Ca. 64. See p. 66.
(3) 7 Bom. H. C. Rep. 64, at p. 66. (4) 5 Calc. W. R., Misc. Ap. 6.
(5) 4 Bom. H. C. Rep., Cr. Ca. 35. (6) 14 Calc. W. R., Cr. Rul. 34.

Lakshman, has taken objection, on his behalf, to the sufficiency of the sanction given by the District Magistrate. He contends that, under section 466 of the Code of Criminal Procedure, no complaint can be entertained for any offence whatever against any public servant not removeable from his office without the sanction of the Government, except with the sanction of the Government itself; and that the sanction by the District Magistrate, besides being vague and indefinite, is insufficient. He referred to the case of *Regina* v. *Parashrám Keshav*, (1) in which it was held that section 167 of the superseded Code of Criminal Procedure, which corresponds with section 466 of the one now in force, required such sanction to give jurisdiction to the trying Court, and that a conviction, founded on evidence taken without such sanction, was bad. He argued that section 466 does not restrict itself to chapter IX or any other chapter of the Indian Penal Code.

We felt some doubt as to the scope of the language used by Mr. Justice Melvill (who delivered the judgment of the Court in that case) in relation to this point. He says at page 63: "but we agree with the view * * * that section 167 relates only to those acts and omissions which are declared in the Penal Code to be offences when they are committed by a public servant." We have, therefore, consulted him, and we find that he did not intend to say that, if there were acts and omissions on the part of a public servant outside the Penal Code, or even within the Code, if the official character of the accused was essential to them, section 167 did not apply. The case he was considering was one which fell within the operation of that Code, and his observations were directed to a denial of the limitation imposed by a circular of the High Court of Calcutta not to laying down a new limitation of the operation of the enactment he was considering.

We are of opinion that the scope of section 466 extends to all acts ostensibly done by a public servant, *i.e.*, to acts which would have no special signification except as acts done by a public servant. In the present case a *máhálkari*, an officer invested with the powers of a Judge in a certain class of cases, is charged with fabricating the

(1) 7 Bom. H. C. Rep. 61 Cr. Ca.

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proceedings of a case from the plaint to the decision, purporting to have been held before himself and complete in every respect, including the signature with his proper official designation. The very object of the fabrication would be to invest those proceedings with a special character, and it is, we think, proper that the alleged fabricator should be dealt with in his official capacity under the provisions specially enacted; although private individuals charged with the same acts or omissions, or acts in one sense the same, would be proceeded against in the ordinary way.

We are thus led to the construction of section 466. The first paragraph of it runs thus:—"A complaint of an offence committed by a public servant in his capacity as such public servant, of which any Judge or any public servant not removeable from his office without the sanction of the Government is accused as such Judge or public servant, shall not be entertained against such Judge or public servant, except with the sanction or under the direction of the Local Government, or of some official empowered by the Local Government, or of some Court or other authority to which such Judge or public servant is subordinate, and whose power so to sanction or direct such prosecution, the Local Government shall not think fit to limit or to reserve." This paragraph prohibits "the entertainment of a complaint" without sanction, and allows the sanction of the Government to be given by deputy. The second paragraph prohibits the "prosecution" of such Judge or public servant, unless with "the sanction of Government." This provision it must be remembered, was not contained in the old Code,—a circumstance which militates, *primâ facie*, against the construction that the second paragraph merely expresses in a condensed form what the Legislature has set out in the first in greater detail.

One possible mode of harmonizing the two paragraphs is to apply the first to complaints by persons injured or by those who, in the interests of justice, take upon themselves to impeach the conduct of public servants; and to apply the second to prosecutions initiated by Magistrates without any complaint. But a little consideration is, we think, sufficient to show the untenability of this construction. Magistrates may be expected to be careful to have strong grounds before they begin prosecutions against public servants, and it is

most unlikely that the Legislature would insist upon the sanction of the Government itself with regard to these prosecutions, and yet allow a vicarious sanction to be given when private individuals take the initiative.

Mr. Gill has argued that the use of the word "complaint" in the first, and that of the word "prosecuted" in the second paragraph point to different stages in the proceeding. This distinction, though ingenious, we are unable to adopt. We think that a prosecution commences when a complaint is made. The observations of Willes, J., in *Austin* v. *Dowling* [1] are pertinent to this point. He says: "The distinction between false imprisonment and malicious prosecution is well illustrated by the case where, parties being before a Magistrate, one makes a charge against another, whereupon the Magistrate orders the person charged to be taken into custody and detained until the matter can be investigated. The party making the charge is not liable to an action for false imprisonment, because he does not set a ministerial officer in motion, but a judical officer. The opinion and judgment of a judicial officer are interposed between the charge and the imprisonment." And in the case, to us a very familiar one, of appeals under section 211 of the Indian Penal Code, we have always held that, when a complaint is made, the proceedings have been instituted and the prosecution has commenced, the reception of the complaint being a stage of the judical proceedings towards conviction.

It appears to us, on a careful consideration of the whole subject, that paragraph 1 of section 466 is intended to apply, at least, chiefly to the cases of persons specially responsible to Government, such as accountants, for instance, who have failed in their duty; and that paragraph 2 is directed to persons professing to exercise certain authority, and with that pretext doing an act which is impeached by a subject on the ground of its being wholly unwarranted, or of an excess or impropriety of some kind. In respect of this paragraph the question for decision would generally be authority or no authority; under the first did the alleged acts or omissions occur?

(1) L. R. 5 C. P. 534, See p. 540.

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This being our opinion on the question of construing section 466, we turn to the question of the sufficiency or otherwise of the sanction recorded in this case. We are of opinion that the case of the *máhálkari* falls within para. 1 of this section, and that the sanction given by the District Magistrate is sufficient, this officer being indisputably the *máhalkari's* superior, and his power not being in any way limited by the Government. We must also over-rule the objection on the ground of vagueness. The direction to prosecute the *máhálkari* under section 466 or any other section which may seem applicable after further investigation, fully legalizes his trial.

Mr. Kashináth Telang, on behalf of his client Váman Hari, has raised another preliminary point. He contends that the subject-matter of the litigation before the Subordinate Judge, in which the alleged fabricated evidence was produced, involved more than Rs. 5,000; that an appeal would, consequently, lie direct to the High Court, which, therefore, is the Court to which the Court of the Subordinate Judge is subordinate for the purpose of giving sanction to Váman's trial. And he laid stress on the fact that the Subordinate Judge had specially declined to grant the sanction when applied for. This objection, also, we must decide in favour of the Crown. The subordination of the Civil Courts is regulated by Act XIV of 1869, and it, in distinct words, makes the Court of the Subordinate Judge subordinate to the Court of the District Judge: whether an appeal lies or does not lie in a certain class of cases to that Court, is not a final criterion to determine the subordination. The Code of Criminal Procedure gives no appeal from the decision of a First Classs Magistrate to the Magistrate of the District, and yet this Court, in the case of *Imp.* v. *Padmanábh Pai*, [1] held that for the purposes of section 468 he was subordinate to him. The subordination spoken of in this section is the general subordination irrespective of special considerations of convenience or otherwise which induced the Legislature to provide a direct appeal to the High Court in certain matters of exceptional importance. The Civil Courts Act gives the District Judge power to suspend a Subordinate Judge, and it would be unreasonable to say that the Court of the latter is not subordinate to that of the former.

(1) *Supra*, p. 3 4

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A similar objection raised by Mr. Ghanashám Nilkanth, on behalf of his client Báláji, must be disposed of in the same way.

[His Lordship then proceeded to discuss the case on the merits, and ordered the acquittal of all the three accused persons.]

Convictions reversed.

[APPELLATE CIVIL.]

Before Mr. Justice West and Mr. Justice Pinhey.

Dec. 10.

BASAWÁ AND GURBASAWÁ, HEIRS OF PARÁPÁ (ORIGINAL DEFENDANTS), APPELLANTS, *v.* KALKÁPÁ, SHARBANÁ AND SIDOJI (ORIGINAL PLAINTIFFS, NOS. 1 AND 2, AND ORIGINAL DEFENDANT NO. 1), RESPONDENTS.*

Registration—Act VIII of 1871, *Section* 49—*Receipt—Release.*

Held that the Court is bound in regular appeal to entertain an objection that a document is invalid for want of registration, even though no objection may have been raised to its admissibility in the Court below.

Held, also, that a document called a receipt, but intended to be used to prove the release of a claim secured by mortgage, required registration under section 49 of Act VIII of 1871, inasmuch as it affected immoveable property.

THIS was an appeal from the decision of A. M. Cantem, Subordinate Judge, First Class, at Belgaum.

The plaintiffs sued to be put into possession of the village of Rámpur for twenty-five years under a mortgage executed to them by the first defendant Sidoji on the 6th of February 1873.

The second defendant Parápá, at the time of the institution of the suit, was in possession of the property under a decree obtained by him in a previous suit against Sidoji upon a mortgage executed by Sidoji to him in the name of one Basalingá. The plaintiffs alleged that this decree had been fradulently and collusively obtained by Parápá, that Sidoji had, in the first instance, denied the claim made in that suit, and had produced a receipt for the payment of his debt, but had subsequently cancelled the power of attorney of the pleader through whom he had adduced the receipt, appointed another pleader, withdrawn his defence, and submitted to a decree. The plaintiffs in the present suit produced the receipt, and the Subordinate Judge, holding it to be proved, was of opinion that the decree, under which Parápá was in possession of

* Regular Appeal No. 22 of 1877.

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the property in question, was collusive, and gave judgment for plaintiffs. No objection to the admissibility of the receipt in evidence, on the ground of its not being registered, was raised in the lower Court.

Shántárám Náráyan for the appellants:—The document of 18th June 1873 is nominally called a receipt, but is really one which, if genuine, operates to extinguish a right. As such it must be registered, or it cannot be received in evidence in the case. This objection is raised here for the first time, but the Court is bound to entertain it under section 49 of Act IX of 1871. If this document be excluded, there is no evidence to prove the collusion alleged.

Vishvanáth Náráyan Mandlik:—The document in question is called a receipt on the face of it, and the plaintiffs want to use it merely as a receipt. [WEST, J.:—If so, it cannot prove a release by Basalingá, and, therefore, is of no use in proving collusion between Parápá and Sidoji.]

WEST, J.:—When Kalkápá obtained from Sidoji the mortgage for Rs. 6,000 on which he now sues (No. 3, dated 6th February 1873), the mortgage of 1869 to Basalingá, representing Parápá, was still unsatisfied. It is referred to in exhibit No. 3, and the money, it is recited, is borrowed in part for the purpose of paying it off. Parápá subsequently, suing Sidoji to enforce his earlier lien, obtained a decree for possession on the 10th November 1873, under which he was put into possession on the 22nd December 1873.

Kalkápá has now come forward seeking possession on his mortgage; and he says that the decree in favour of Parápá was obtained by collusion with Sidoji, Parápá's claim having, in fact, been satisfied by an intermediate transaction of the 18th June 1873. To establish this transaction, Kalkápá put in evidence a document (No. 45) called a receipt, but intended, if authentic, to entirely release Parápá's claim, through Basalingá, under the mortgage of 1869. This instrument seems not to have been objected to below on the ground of its non-registration; but that objection having been taken before us, we have to consider whether it is open to the defendent Parápá at this stage, and whether it must be ad-

mitted so as to exclude the document as evidence to be made use of in disposing of the case. On the first point, we are of opinion that we are bound to take notice, in regular appeal, of a positive invalidity of a document created by a statute, even though no objection may have been raised to its admission in the Court below. In the case of *Nixon* v. *The Albion Marine Insurance Company*[1] the Court declined to proceed on a case submitted to it, the document on which the claim rested being unstamped, though both parties were desirous of a decision. The interests of the revenue, the Court thought, required that they should, *suo motu*, notice the defect which came under their observation in the course of the inquiry. The bulwark against fraud, intended to be constituted by registration, is of as great public importance even as the interest of the revenue, and when we find that the Registration Act VIII of 1871, section 49, says not only that a document requiring registration, but unregistered, shall not be received in evidence, but also that it shall not affect any immoveable property, we think that we could not, consistently with the law, allow it to count as a part of the materials on which we have to dispose of this case, supposing that registration was, indeed, indispensable to its validity.

On that point it has been urged by Mr. Mandlik that the document No. 45 is, *primâ facie*, a receipt that his client Kalkápá wishes to employ it in no other character, and that as a receipt it did not need registration. But as a mere receipt for so much money, if it were, in truth, limited to that, it could not prove the release or extinguishment of any particular right over the property in dispute vested in Parápá by the mortgage. It could not, therefore, show that, in subsequently admitting Parápá's claim under that mortgage, Sidoji wilfully failed to assert his own rights. It was only if his mortgage was released that Parápá's claim to possession could be unfounded, or Sidoji's admission of it could be a fraud on Kalkápá. To prove that it had been released, the document No. 45, which is express to that effect, was put in, and that is exactly the use that was made of the document by the Subordinate Judge. In the case of *ex p. Mackay*, [2] Mellish, L.J. says of an agreement to execute a bill of sale: "No doubt, *quâ*

(1) L. R. 2 Ex. 338.

(2) L. R. 8 Ch. App. 643.

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agreement, it does not require registration ; but in my opinion, we ought to hold that an agreement to execute a bill of sale ought not to be held equivalent to an actual bill of sale in equity without involving the consequence that brings it within the Bills of Sale Act, and that, if it is not registered, the Court will look on it as invalid." This was followed in *ex p. Conning*,(1) and it is clear that the design of the Registration Acts would be entirely defeated if a document introduced, as of a kind not requiring registration, could then forthwith be employed for purposes which the law intends to be effected only by registered instruments. The observation of Lord Cottenham in *Evans* v. *Prothero*,(2) show that, in his opinion, a document which required a receipt stamp could not be used unstamped to prove either the payment of the money as an ultimate fact, or any remoter matter towards the proof of which the payment of the money would tend by way of inference. In a subsequent stage of the same case Lord St. Leonards(3) thought that as evidence of an agreement referred to in it, the document would be admissible, but this would have been independently of the sense of the document as a receipt, and through words separable from those which constituted the acknowledgment. In the case now before us, the document No. 45 can have made the subsequent suit and admission collusive only by operating as an actual release ; and operating or being meant to operate in that way, it required registration.

The case of *Futtehchund Sahoo* v. *Leelumber Singh*(4) strongly supports the view we take of this case. There an instrument acknowledging the receipt of money as consideration, not for an absolute conveyance, but for an agreement to execute a conveyance, was held by the Judicial Committee, under circumstances of considerable hardship, to be inadmissible without registration as evidence of the transaction recorded in it. To the same effect is the case of *Valáyi* v. *Thomas*,(5) and *Máhádáji* v. *Vyankáji*(6) is closely parallel to the present case. Westropp, C.J., says : " The object of the first defendant (appellant) in giving the instrument No. 17 in evidence, is to show that Kázi Muhammad's mortgage lien

(1) L. R. 16 Eq. 414.
(2) 20 L. J. Ch. 450.
(3) 21 L. J. Ch. 772.
(4) 14 Moore's Ind. Ap. 129.
(5) I. L. R. 1 Bom. 191.
(6) I. L. R. 1 Bom. 197.

on the land has been extinguished, and was so previously to the alleged transfer or assignment of that lien to the plaintiff;" and as the acknowledgment would have this operation, and it was proposed to use it for that purpose, the learned Chief Justice said that it was clearly "inadmissible for such a purpose." Although, therefore, the document No. 45 might conceivably be admissible for some purposes, it cannot, we think, be used to establish the fact which it was brought forward to prove; and the basis on which the allegation of fraud and collusion rested thus seems to us entirely to fail.

It is said, however, that the plaintiffs, had this document No. 45 not been admitted in the Court below, might have proved the alleged collusion by other testimony, and that they ought now to have an opportunity of bringing forward that testimony if it be procurable. But the charge against Parápá and Sidoji was one of collusion to defeat Kalkápá's mortgage lien, by a specified means, namely, the fraudulent withholding, by Sidoji, of the good defence which the document No. 45 afforded to him against Parápá's suit on his mortgage. If there was any other ground than this particular collusion on which Kalkápá's claim could be rested, he was bound to bring it forward: resting on the alleged collusion, he was bound to bring forward all the evidence of it that he thought might strengthen his case. A good deal of such evidence he has, in fact, brought forward, and we cannot doubt that if he had found additional testimony available, he would have made use of it. But we do not think that when a portion of the available evidence has been neglected by a party in reliance on a particular document, not in itself decisive of the issue, but only affording strong evidence bearing upon it, he can reasonably claim that this defect of judgment on his part should be remedied by a new trial of the same issue. The document No. 45 in this case, even if proved, was not necessarily decisive of the issue of collusion; the conduct of Parápá and Sidoji might admit of explanation; and Kalkápá ought to have brought forward, as, indeed, he probably did, all the confirmatory evidence that could be had. We cannot, therefore, remand the case; and as it is hardly contended that the decision of the Subordinate Judge can be supported on the evidence as it stands, we must reverse it, and reject the claim, with costs in both Courts on the plaintiffs.

Decree reversed with costs.

[APPELLATE CIVIL.]

Before Sir M. R. Westropp, Kt., Chief Justice, and Mr. Justice West.

1877. December 21.

LAKSHMAN RAMCHANDRA JOSHI AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS, *v.* SATYABHAMABAI, WIDOW OF GOVIND NÁRÁYAN (ORIGINAL PLAINTIFF), RESPONDENT.*

Hindu law—Widow—Maintenance—Charge on estate in the hands of purchasers with notice—Notice.

In a suit for maintenance brought by a Hindu widow against her husband's brother, who was the sole surviving member of that husband's family, and against *bonâ fide* purchasers for value from him (the defendant) of certain immoveable ancestral property of the family,

Held—

The mere circumstance that such purchasers had notice of her claim is not conclusive of the widow's rights against the property in their hands.

If the property were sold in order to pay debts (not incurred for immoral purposes) of her husband, or his father, or grandfather, or for the benefit of the undivided family, or to satisfy a former decree obtained by the plaintiff herself against the same defendant for maintenance, such sale would be valid against her, whether or not the purchasers had notice of her claim.

Per West, J.:—According to the Mitakshara, sons must, from the moment of their father's death, be regarded as sole owners of the estate, yet with a liability to provide for the maintenance of their father's widow, and with a competence on the widow's part to have the estate made answerable. If the sons make a division of the estate, they must allot to their mother an equal share, and the same to any sonless widow of their father. The widow has no proprietorship in the estate before its partition, but she has an equity to a provision, which the Court will enforce to guard her against attempted fraud.

The debts of the deceased owner take precedence of the maintenance of the widow. The estate is properly applied, in the first instance, by the sons as managers in payment of such debts.

By a sale of the property, the sons cannot evade a personal liability to provide for the widow.

If a mother, foregoing her claim to a separate provision out of the paternal property, resides with her sons or step-sons, and is maintained by them, she must submit to their dealing with the estate. A fraudulent alienation for the purpose of defeating her claims will not be supported, but the particular assignee for value acquires a complete title.

In the case of a widow of an ordinary co-parcener as against the surviving members of the joint family, *her* claim being strictly to maintenance only, regulated by the circumstances of the joint family, it appears that, although she may have her maintenance made a charge on the property, yet, if she should refrain from that course, she leaves to the co-parceners an unlimited estate to deal with at their discretion and in good faith.

* Special Appeal No. 135 of 1877.

If there is an ample estate left, out of which to provide for the widow, or if, knowing of a proposed sale, she does not take any step to secure her own interest, no imputation of bad faith, or of abetting it, can be made against the purchaser of a portion of the joint property. If the widow, on the other hand, is not accepting support from the co-parcener, if she lives apart, and if the estate is small and insufficient, it is the vendee's duty, before purchasing, to inquire into the reason for the sale, and not by a clandestine transaction to prevent the widow from asserting her right against the intending vendor. It is in this connection that the doctrine of notice becomes of importance.

The knowledge of collateral rights created by agreement in equity frequently qualifies those acquired by a purchaser. The widow's right to maintenance is a right maintainable against the holders of the ancestral estate in virtue of their holding no less through the operation of the law than if it had been created by agreement, and so when the sale prevents its being otherwise satisfied it accompanies the property as a burden annexed to it in the hands of a vendee with notice that it subsists, though equity as between the vendee and the vendor will make the property retained by the latter primarily answerable.

Whether such a claim by a widow against the estate of her deceased husband in the hands of a purchaser is enforceable or not, does not depend upon whether the remainder of the estate in the hands of the heir has been exhausted. What was honestly purchased is free from her claim for ever. What was purchased in furtherance of a fraud upon her, or with knowledge of a right which would thus be prejudiced, is liable to her claim from the first. The relations of the parties are determined once for all at the moment of the sale.

There is no authority for the doctrine which makes the claim of widows not entitled to a share of property in case of partition a real charge on the inheritance, and ranks the claim of widows who are so entitled as a mere moral obligation. In all cases it is a claim to maintenance merely, not interfering (so long as it has not been reduced to certainty by a legal transaction) with the right of the actually participant members to deal with the property at their discretion, provided this dealing is honest and for the common benefit.

The reduction of the number of surviving co-parceners to a single person makes no difference in the widow's legal position. The rights and obligations of the original co-parceners fall at last to the sole survivor. The widows must be maintained by him out of the property, but he may still deal with the estate at his discretion in the absence of actual fraud or of a decree which has converted some widow's claim into an actual right *in re*. The purchaser from him takes a perfectly good title, and one which, if good at the time, cannot be inpaired by subsequent changes in the circumstances of the vendor's family.

Authorities on the subject of Hindu widow's maintenance reviewed.

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This was a special appeal from the decision of W. Wedderburn, Judge of the District of Thánáá, amending the decree of the Subordinate Judge at Alibág.

The plaintiff Satyabhámábái, a Brahman widow, sued in the Court of the Subordinate Judge of Alibág to recover Rs. 188-10-8 on account of maintenance for forty months from 11th June 1869 to 5th October 1872, and for an order entitling her to maintenance at the same rate, during her life-time, for the three defendants personally and from the joint family property. The property was valued by the plaintiff at Rs. 4,000, and it had been sold by Máhádev, defendant No. 1, brother of the plaintiff's deceased husband Gobind, to Lakshman, defendant No. 2, who sold a part of it to Vishnu, defendant No. 3.

Máhádev did not appear.

Lakshman, defendant No. 2, answered that the plaintiff had no claim against him or against the estate, which was first mortgaged to him by Máhádev and afterwards sold for Rs. 1,400 in order to pay debts, for which the plaintiff's husband was liable, and to satisfy a decree for maintenance obtained by the plaintiff; that the estate was not worth more than Rs. 400; that a portion of the estate, consisting of a garden, had been sold by him to Vishnu, defendant No. 3; and that the remainder produced only enough to pay the Government assessment, the cost of repairs, the interest on the purchase-money, and the maintenance awarded to Sarasvatibái, a widow belonging to the family, whose husband was a half-sharer in the property.

The third defendant, Vishnu, answered that the plaintiff had no claim against the property in his hands; that he had purchased from Lakshman a garden which had been sold to Lakshman by Máhádev to pay the debts of the plaintiff's husband and of the joint family and the maintenance awarded to the plaintiff herself, and that the said garden was already charged with the cost of maintaining a lamp in the temple of Rámeshvar, with an annual payment of Rs. 18 to Sarasvatibái, and with the Government assessment.

The Subordinate Judge of Alibág decreed that the plaintiff was entitled to maintenance from Máhádev, defendant No. 1, but not from the family property, which had been purchased by the other defendants.

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Against this decree the plaintiff appealed to the District Judge. The two points mainly argued before him were, first, whether, in consequence of a former suit, which the plaintiff had brought for maintenance from the year 1864 to the year 1866, the plaintiff's present suit was *res judicata;* second, whether the plaintiff's maintenance was a charge on the estate in the hands of the purchasers who had notice of her claim. Both these points were decided by the District Judge in the plaintiff's favour. He, therefore, amended the decree of the Court of first instance, and directed that the plaintiff should recover from the family property in the hands of defendants Nos. 2 and 3 at the same rate as was decreed to her in her former suit. He was of opinion that, looking to the deed of sale (exhibit No. 34) executed by Máhádev to Lakshman, as well as to the decree formerly obtained by the plaintiff (exhibit No. 35), there could be no doubt that the purchaser was aware of the plaintiff's claim; and, following the decision in the case of *Srimati Bhagábati Dási* v. *Kánailál Mitter and others,* (1) passed a decree for the plaintiff.

The defendants appealed.

Mr. Shántárám Náráyan for the appellant.

Mr Máhádev Chimnáji Apte for the respondent.

The arguments and cases cited fully appear in the following judgments :—

WESTROPP, C. J.—The first question raised at the hearing of this appeal was whether the cause of action alleged by the plaintiff is *res judicata.* We have already, during the argument, stated our opinion to be that, inasmuch as the former suit brought by her was for maintenance from the year 1864 to the year 1866, and the decree made therein against Máhádev Náráyan personally was not prospective and not against the ancestral estate, and the present suit is for maintenance from 11th June 1869 to 5th October 1872, and for an allotment of future maintenance out of the ancestral estate, this suit is not *res judicata.*

I may observe, however, that it is to be regretted that, in the former suit, an order, awarding to the plaintiff future maintenance, was not included in the decree. It is not desirable that there

(1) 8 Beng. L. R. 225.

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should be several suits in respect of the maintenance of one widow. The system of seeking or granting relief piecemeal subjects both plaintiff and defendant to much unnecessary expense and trouble, and is only advantageous to the legal profession. Such a course ought to be discountenanced, so far as may legitimately be done, by the civil Courts.

It has been properly admitted that the defendant Lakshman when he accepted the deed of sale (exhibit 34) from Máhádev Náráyan, had notice of the plaintiff's claim for maintenance. Indeed, Lakshman's learned pleader relies on the alleged fact that a part of the consideration for the sale to Lakshman was money paid by him in or towards satisfaction of her claim for past maintenance against Máhádev, her brother-in-law. It has also been rightly admitted that Vishnu, when he purchased the garden from Lakshman, was aware of the plaintiff's claim. Under these circumstances, his right to resist the plaintiff's claim is dependent on that of Lakshman to do so.

The District Judge has held that the fact that Lakshman and Vishnu had such notice, bound the immoveable property in their hands, and left it subject to her demand.

It appears, however, to me, on consideration of the Hindu law as administered under the Mitakshara and Mayukha in this presidency, that the circumstance of notice of her claim for maintenance is not conclusive of her rights as against the immoveable property in their hands.

Putting her claim at the highest, it cannot be regarded as superior to that, amongst Hindus, of a son against the ancestral estate. A sale by a father for payment of the debts of his own father or grandfather, not contracted for immoral purposes, is good as against his son. Even if the father have sold ancestral property for the discharge of his own debts, not incurred for immoral purposes, and the application of the bulk of the proceeds in payment of those debts have been satisfactorily accounted for, the fact that a small part is not accounted for will not invalidate the sale—*Girdharee Lall* v. *Kantoo Lall*, (1) *Nárayanácháryá* v. *Nárso Kishna*, (2) Narada (Dr. Jolly's Translation), p. 98, pl. 32.

(1) L. R. 1 Ind. Ap. 321. (2) I. L. R. 1 Bom. 262.

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The same rule is applicable to the present case. And, even if the ancestral property devolve upon a Hindu widow, she would not only be justified, but it would be her duty to apply it if necessary in payment of the debts (not contracted for immoral purposes) of her deceased husband or of his father or grandfather—Mayukha, ch. V, sec 4, pl. 17, 20; 1 Dig., bk. I, ch. V, pl. 171, Comm.; 2 Stra. H. L., 280, 281, 282; 1 West & Bühler, 68; 1 Morris S. D. A. Rep. 184; 2 Borr. 127 (Reprint.)

Therefore if the mortgage by Máhádev to Lakshman, or the sale to him, were made for the purpose of paying debts of Náráyan, who was father of Govind as well as of Máhádev, or of Náráyán's father, or for the purpose of paying the debts of Govind himself, and such debts were not of an immoral nature, the mortgage and sale would be valid as against the plaintiff, whether or not Lakshman had notice of her claim for maintainance. *A fortiori*, in so far as the consideration for the sale to Lakshman consisted of money advanced by him in or towards the plaintiff's past maintenance, or in or towards satisfaction of her decree and the costs of her suit against Máhádev for past maintenance, it would be a valid consideration, and would bind her independently of the fact that Lakshman had notice of her claim.

In so far as the consideration for the deed of sale consisted of the amount due on the mortgage, it would be a valid consideration to the extent to which, on the grounds already mentioned, the mortgage itself would be sustainable against the widow.

If any portion of the consideration, either of the mortgage or of the deed of sale, consisted of moneys raised for the purpose of paying debts, other than those already mentioned, but incurred for the benefit of the joint family, such portion would be rightly deemed a valid consideration so far as it may extend.

I refrain from expressing any opinion as to the rights of a widow who obtained a decree against the family estate for prospective maintenance, if subsequently the creditors of her husband, or of his father or grandfather, instituted an administration suit, against her and the surviving parceners, praying a sale of the estate, and application of the proceeds in payment of the debts due to creditors by her husband or his father or grandfather.

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The decree of the District Judge should, I think, be reversed (except as regards his finding that the suit is not *res judicata* in the plaintiff's former suit for maintenance), and the cause should be remanded for re-trial by the District Judge on the merits. On such re-trial, the District Judge should determine whether the mortgage of the 6th January 1867 by Máhádev to Lakshman was *mainly* executed for the purpose of raising money to pay the debts (not incurred for immoral purposes) of his father or grandfather or of his brother Govind, or of any one or more of them, or of paying other debts incurred for the benefit of the joint family whereof Govind and Máhádev were amongst the members; and whether the deed of sale (exhibit 34) of the 24th July 1867 was *mainly* executed in consideration of the moneys due on the said mortgage, or of moneys applied in payment of such debts as aforesaid, and of moneys applied in or towards the claim of the plaintiff for past maintenance, or of the amount due to her for such maintenance and costs awarded to her by the decree in her former suit for maintenance.

The costs of this suit and of both appeals should be disposed of by the District Judge in such manner as may be just.

WEST, J.—Satyabhámábái, the plaintiff in the present case, is the widow of Govind Náráyan, who died united in interest with his brother Máhádev. As Máhádev refused to pay her the maintenance to which she was entitled, she sued him, and obtained a decree, under which it appears that she was paid rupees one hundred and thirty-four nine annas and nine pies by the defendant Lakshman on account of Máhádev (exhibit 35). This Lakshman is the purchaser, by the document (exhibit No. 34), from Máhádev of the family estate, and a part of the consideration specified is "rupees (300) three hundred, borrowed to pay the maintenance of Máhádev's sister-in-law under a decree." Lakshman, therefore, knew of Satyabhámábai's existence, and the right she set up when he purchased the property. So, too, did Vishnu, the third defendant, who purchased a portion of the property from Lakshman. He inquired from Máhádev how Satyabhámábái's subsistence was to be provided for; but, being told that certain rice-land

had been reserved for the purpose, he rested content with that mere assurance.

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The District Judge, following the case of *Srimati Bhagábati Dási* v. *Kanailál Mitter and others*, (1) has held that the notice thus brought home to Lakshman and Vishnu makes the joint property answerable for the maintenance of Satyabhámábái, and he has pronounced in favour of her right, as against the property purchased by Lakshman and Vishnu, to maintenance at the rate settled as appropriate in the former decree against Máhádev.

It is now contended that Satyabhámábái's maintenance was not such a charge on the estate as to give her any kind of proprietary interest in it; that her right, however limited in amount by the value of her deceased husband's share in the property, is a merely personal one against Máhádev, and that notice of what is not really a charge in the sense of an interest in the property cannot convert the merely personal obligation into a real right, by way of incumbrance on the property, accompanying it into any hands whatever into which it may pass. The alienation, too, it is argued, was to enable Máhádev to pay off debts chargeable against the united brethren while any remained to form a joint family with Máhádev, or else contracted by the plaintiff's husband Govind, and, therefore, properly met by a sale of the joint property so far as necessary to defray them within the limits of his share, out of which alone Satyabhámábai, it is urged, can claim a maintenance.

In the recent case, relating to the same estate as that now before us, of *Lakshman* v. *Sarasvatibái*, (2) it is said "if the vendor was absolute owner, it is clear the sale conveyed absolute ownership of the property to the vendee, the first appellant. But if that was not the case, it is equally clear that by the sale such right only passed to the vendee as was possessed by the vendor;" and, after a discussion of some of the cases on this subject, the learned Judges arrived at the conclusion that they do not "establish that the maintenance of a Hindu widow is a charge on any such property (as in this case) in the hands of a *bonâ fide* purchaser from her late husband's successors." In one of those

(1) 8 Beng. L. R. 225. (2) 12 Bom. H. C. Rep. 69; see p. 71.

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cases, however (*Heerálál* v. *Mussamut Kousilláh*),(1) the Court certainly say that the widow's right to maintenance is not merely "a right of action against the heirs personally who take the property," but "a charge on the property which formed the estate of her husband;" which charge the court accordingly enforced against the purchaser of part of the family property, though with an equitable reserve in his favour that execution should first proceed (if possible) against the vendors. In *Rámchandra* v. *Savitribái* (2) also it was laid down that "by Hindu law the maintenance of a widow is a charge upon the whole estate, and therefore upon every part thereof." It is true that the learned Judge Sir R. Couch, C.J., who delivered the judgment of the Court on that occasion, afterwards (*S. M. Nistarini Dási* v. *Makhanlál Dutt*)(3) declined to recognize its authority. "The question," he says, "there, was as to whether one brother could be sued alone, and it was held that he could," but still the one brother appears to have been sued as holding part of the family property, not as liable apart from that circumstance, so that, as regards the coparceners in possession, the case must be taken as an authority for the position that the widow's maintenance is a charge on the property, and not merely against the person—a distinction which is necessary to support the decision in several other cases.

In the case of *Mussamut Golab Koonwer* v. *The Collector of Benares*,(4) it was held that the confiscation of an estate did not annul the right of the mother of the owners, who had inherited it, to maintenance out of it. The learned Judges in the case of *Lakshman* v. *Sarasvatibái*(5) explain the decision of the Privy Council as having proceeded upon a tacit concession of the widow's right by the Government. Phear, J., in the case of *Gunga Báee* v. *The Administrator-General of Bengal* (2 I. J. N. S. 124), as quoted by L. Jackson, J., in *Adhiranee Narain* v. *Shona Mali*,(6) explains the decision in another way. "The plaintiff's right to maintenance," he says, "had by her husband's death become an actual charge on the estate in question before the cause of

(1) 2 Agra Rep. 42.
(2) 4 Bom. H. C. Rep. 73, A.C.J.
(3) 9 Beng. L. R. 27.
(4) 4 Moo. Ind. Ap. 246.
(5) 12 Bom. H. C. Rep. 69.
(6) I. L. R. 1 Calc. 365; see p. 37.

forfeiture had accrued." This seems to be only what may be said of the right of every Hindu widow whose husband has left property out of which her maintenance can be supplied; and the case is an authority, though under the circumstances not a strong one, for the widow's maintenance constituting a real interest in the estate.

The other cases referred to by our learned colleagues do not appear, when taken with several other important decisions, to be necessarily decisive of the question at issue in the present case; and, considering the diversity of views that has existed on the important topic of the Hindu widow's maintenance in relation to the family estate, it seems desirable to examine the subject rather more at large.

Through her marriage a Hindu woman, according to Jimûta Vâhana, (1) acquires an interest in her husband's property, though only, according to some writers, of a secondary kind, such as may be divested by a gift by the husband to a third party. A higher interest could certainly not be assigned to her consistently with that text of Manu (chap. VIII., pl. 416), which ranks her along with a son and a slave as incapable of having wealth exclusively her own, (2) but this interest has been deemed enough to entitle her to an equal share with sons when her husband makes a partition of his property.(3) The Vyavahara Mayukha deals even with the reunion of a wife with her husband, which implies a previous partition, in the sense probably of the allotment of a share in a division with the sons. Apastamba denies (Coleb. Dig., bk. V., ch. II., pl. 89) that such a partition can take place, because of the essential unity of the married pair,—a reason which could not apply after the husband's death. That event, however, while removing the superior and dominant interest of the husband,

(1) Dayabhaga, ch. XI., sec. I., pl. 26 : Jagannath, see Coleb. Dig., bk. V., VIII., sec. I., pl. 415 ; see also Smriti Chandrika, ch. IV., pl. 9 ; ch. IX, sec. 2, pl. 14 ; ch. II, sec. 1., pl. 19.

(2) Vyav. Mayukha, ch. IV, sec. 10, pl. 7 ; Smriti Chandrika, ch. 9, sec. 1, pl. 12, 13.

(3) Coleb. Dig., bk. V.. Ch. II., pl. 87, 88, Comm.

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appears to have been recognized by, at least, some of the Smritis as bringing out the wife's right into greater definiteness. Manu (chap. V., pl. 148) and Narada (Pt. I, ch. III., 36) alike insist on the dependence of women; yet Narada (Pt. I., ch. III, 39, 40) assigns to the widow, on her husband's death, a general control of the estate in priority even to sons. Manu (chap. IX., 104) says that a partition cannot be made during her life by the sons —cannot be made, it has been understood, without her assent —and H. H. Wilson (Works, vol. 5, p. 28) makes the necessity of this consent a ground for her right of absolute disposal over the share allotted to her in the partition (2 Str. H. L. 383). In this Presidency the sons' right to a partition, as it subsists against their father, subsists also against their mother; but the widow's right has not been regarded by the shastris as originating in the partition, though a separate effect is thus given to it (Mitak., ch. I., sec. VII., pl. 1). In the case at 1 West and Bühler, 27, Q. 10, and in several other cases, as at 2 West and Bühler, 29, the widow has been pronounced entitled to a share equal to that of a single son, who, being such, could not make a partition in the sense to which the text of the Mitakshara directly applies. That this share is not a mere maintenance to be allowed in the discharge of a filial duty[1] appears from the passage of Vyasa quoted in the Vyavahara Mayukha, chap. IV., sec. IV., pl. 19:—"Even childless wives of the father are pronounced equal sharers." The sons, therefore, who in a partition fail to allot the proper share to their mother, can be compelled to do it afterwards: 2 West and Bühler, 31, Q. 3. In Bengal it has been held that the mother is a necessary party to a suit brought by a son for a partition: *Laljeet Singh* v. *Rájcoomár Singh.* [2]

If the mother is a necessary party to a suit for partition, it is hard to conceive of her as not having an interest in the property as distinguished from a mere claim against the persons of her sons for a sufficient allotment.[3] It is consistent with the existence of this interest that in many cases, such as that of *Subchandur Bose* v. *Gooráopersad Bose* (Sir F. Macn., Cons. H. L., 62), an order

(1) Manu, cited Coleb. Dig., bk. III, ch. IV., pl. 397, Comm.
(2) 12 Beng. L. R. 373; see p. 383, S. C. 20 Calc. W. R. 336.
(3) Coleb. Dig., bk. V., ch. II., pl. 89, Comm.

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to provide a suitable maintenance for the widows, even sonless widows, of a deceased father should have been regarded as a necessary preliminary or ingredient of a decree for partition. In the case of *Comulmony* v. *Rámmnáth*, (1) Seton, J., says: "The right of a Hindu female to maintenance is one peculiarly needing protection, and ought not to be defeated, but upon the clearest grounds. A nuptial or testamentary gift by the husband might have this effect, or, at all events, might put her to her election." In that case, the partition had been made under a will which bequeathed the whole property to the sons without mention of the widow; but her right was maintained by construing the will as having tacitly reserved it. In *Jodoonáth* v. *Brojonáth*, (2) a mother who had taken some benefit under her husband's will, was declared entitled, on a partition amongst the sons, to so much as with her legacy would make her share equal to one of theirs. This seems to be in substance allowing the widow to elect to take a son's share against the provisions of the will.

The debts of the deceased owner, as Mr. Shántárám Náráyan pointed out, take precedence even of the maintenance of the widow. In the case at 1 West and Bühler 68, the shastri says that the alienation of a house by a widow who has inherited it from her husband must be made for the payment of his debts in precedence of her own subsistence. The same obligation, however, or even a stronger one, rests on the sons (2 West and Bühler, Intro. xxviii). According to the letter of the texts they are not to divide the paternal estate until the paternal debts are paid. Yet this has never been held to prevent them from acquiring a complete right, and even separate rights, in the property through the existence of debts at the time of their father's death. They may even dispose of the estate notwithstanding the existence of such debts, and convey a good title to a purchaser: *Jamiyatráv Parbhudas*. (3) If the widow of a man who has left sons, therefore, has an interest in the property itself, that right is in no way inconsistent with the estate's being charged with the debt of

(1) Fulton's Rep. at p. 203. (2) 12 Beng. L. R. 385.

(3) 9 Bom. H. C. Rep. 116.

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the deceased husband, or with other debts for which it may be made answerable. Her rights may be postponed to those of creditors, because she shares the ownership of that out of which their claims have to be satisfied, and which is most properly applied to such a purpose in the first instance by the sons as managers of the joint estate.

In the case of *Mangala Debi* v. *Dinánáth Bose*, (1) Sir B. Peacock, C. J., ruled, with the entire concurrence of Mitter, J., that an adopted son could not convey to a stranger such a right to the family dwelling as to deprive his adoptive mother of her right of residence. For this position a Bombay case, *Prankoonwar* v. *Devkoonwar* (2) is quoted, and reference is made to a passage of Katyayana in Coleb. Dig., bk. II., chap. IV., s 19. This precept, which the Court construed as of legal and not merely moral obligation, seems to put the requisites for the maintenance of the family on the same footing as the family dwelling. If the one cannot be affected by alienation without a due provision made for the widow, neither, it may not unreasonably be contended, can the other. The authority of this case is recognized in *Srimatti Bhagabáti* v. *Kanailál Mitter*, (3) where Phear, J., applies it to support the proposition that, "as against one who has taken the property as heir, the widow has a right to have a proper sum for her maintenance ascertained and made a charge on the property in his hands. She may also, doubtless, follow the property for this purpose into the hands of any one who takes it as a volunteer, or with notice of her having set up a claim for maintenance against the heir." It has been followed and extended in the case of *Gauri* v. *Chandrámani*, (4) in which the purchaser at an execution sale of the rights of a nephew was successfully resisted as to one-half of the family dwelling by the widow of the judgment-debtor's uncle.

These several authorities, no doubt, afford, in combination, a strong support to the proposition that a widow's maintenance, especially as against the sons, is a charge on the estate, a right *in re* in the fullest sense adhering to the property, into whatever hands it may pass. Jagannath insists on her right to a partition as

(1) 4 Beng. L. R. 72, O. C. J. (2) 1 Borr. 404. (3) 8 Beng. L. R. 225.
(4) I. L. R. 1 All. 262.

against her sons,(1) and, according to Sir W. Macnaghten,(2) "the widow (in Bengal) is not only entitled to share an undivided estate with the brethren of her husband, but she may require from them a partition of it, although her allotment will devolve on the heirs of her husband after her decease," and this right was, on the authority of a number of unreported cases, recognized in the recent case of *Sowdáminee Dossee* v. *Jogeshchandra Dutt*,(3) though declared subject to the discretion of the Court. It is not easy to see how a widow who cannot be deprived of her proper share by her husband's will, whose maintenance is secured by a text recognized as legally binding, and must be provided for in any partition, and who may demand a severance of her proper aliquot allotment, can, as to her life-interest, be less than an actual co-sharer in the estate. Yet Jimûta Vâhana says: "There is neither partition nor co-parcenary with the mother"(4)—no co-parcenary, as he explains, in the special sense of membership of a joint Hindu family.(5) In the recent case of *Baboo Din Dayál Lál* v. *Baboo Jag Dup Náráin Sing*(6) the Privy Council (25th July 1877), holding that a purchaser at an execution sale of the father's interest had acquired a right only to a severance of his share as distinguished from the sons', recognized that, in the partition to be thus made, the wife also of the judgment-debtor, if he had one, might be entitled to an allotment. This is to be referred to the wife's right in her husband's property acquired by her marriage. As to this "there is no proof"—the Dayabhaga says (chap. XI., sec. I., pl. 26)—"that it ceases on her husband's death. But the cessation of the widow's right of property, if there be male issue, appears only from the law ordaining the succession of male issue." Jimûta Vâhana in this way makes out that, while the widow's right to her husband's whole share or whole estate subsists in spite of the survival of other undivided co-parceners, it is extinguished by the superior right of a son, grandson, or great-grandson, through the operation of the special texts in their favour. In Bengal, then, it seems that the widow has a complete proprietorship, subject to restrictions on waste,

(1) Coleb. Dig., bk. V., ch. II., pl. 89, Comm.

(2) 1 Macnaghten's Hindu Law, 49. (3) I. L. R. 2 Calc. 262.

(4) Dayabhaga, ch XI., sec. I., pl. 30. (5) *Ibid.*

(6) L. R. 4 Ind. Ap. 247.

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as against other co-parceners; no proprietorship at all as against sons. Yet in Bengal, as in the provinces governed by the Mitakshara, "when partition is made by brothers of the whole blood after the demise of the father, an equal share must be given to the mother."(1) The mother's ownership, which has, according to this view, been extinguished, revives again on a partition amongst her sons. Their ownership in the mean time is complete. The mother's right during that time may be considered as in some degree analogous to the wife's equity to a settlement under the English law. Out of prudence and affection her deceased husband would have made a distinct provision for her had that seemed necessary. She may at any moment require that such a provision be made by the sons, and duly secured. They cannot free themselves from the co-parcenary relation without giving her an equal share. Although, therefore, her power of disposition is in many respects limited to her own life, there seems to be nothing unreasonable in pursuing the analogy somewhat further. As it is a consequence of her forbearance that the estate is larger by the particular portion that she might have required to have distinctly settled on her, she may fairly claim, as against her sons' assignees or creditors, a maintenance allowed as a charge on the estate which they appropriate, except in cases of a responsibility arising from her fraud or direct participation in the sons' transactions. As regards her husband's united brethren (and brethren here are the type of all co-parceners), the widow's right appears, according to the Dayabhaga, to be developed into a completed ownership, subject to its proportion of the common burdens, at the moment of her husband's death. If she chooses, she may forthwith have her own share ascertained and separated. But this is placed by the Dayabhaga(2) on the ground that the several co-parceners are really rather like tenants in common, each having a right only to an aliquot, though unseparated, portion, so that, on the death of one, there is no right of survivorship to intercept his widow's right of succession under Yajnavalkya's text, which the Bengal lawyers apply to a united as well as to a divided family.(3)

(1) Dayabhaga, ch. III., sec. II., pl. 29. (2) Chap XI., sec. I., pl 25, 26.
(3) Dayabhaga, ch. XI., sec. I., pl., 26 46; Coleb. Dig., bk. V., ch. I., sec. I, pl. ii, Comm.

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This right of survivorship, on the other hand, is fully recognized by the Mitakshara as excluding the widow and the other heirs in the enumeration of Yajnavalkya, when there are undivided co-parceners to take the estate.(1) The rule is a consequence of the doctrine (2) that the right of each co-parcener extending to the whole estate, it is fully owned as to every part notwithstanding the death of one of the joint-tenants.(3) If the co-parceners of the deceased were his sons, they, as in Bengal, take in preference to all other pretenders.(4) If they make a division of the estate, they must allot to their mother an equal share, and the same to any sonless widow of their father; but this does not of necessity invest the widows here, any more than in Bengal, with a proprietorship in the estate before its partition. The sons must, from the moment of their father's death, be regarded as sole owners, yet with a liability to provide for the widow's maintenance, and with a competence, on the widow's part, to have the estate made answerable. In the case of *Baijun Doobey* v. *Brij Bhookun Lall Awusti*(5) the Judicial Committee say: "The maintenance of Net Kouwar, the widow of Muddun Mohan, was a charge on the inheritance which came from Muddun Mohan. The liability to maintain the mother passed to Chintaman when he got the estate of his father, and, when the estate passed from Chintaman to his widow, the liability to maintain Net Kouwar still attached to the inheritance,(6) and Doorga (the son's widow) was bound to maintain her out of the inheritance." Apart from the general obligation to maintain aged parents, (7) the relations out of which this right of the widow springs, appear to exist as effectively under the law of the Mitakshara as under that of the Dayabhaga. Her moral identity with her husband is no less complete; her rights as a widow succeeding to the estate are rather more extensive under the western than the eastern law.

(1) Mitaks., ch. II., sec. I., pl. 19. (2) Mitaks., ch. I., sec. I., pl. 30.

(3) See Smiriti Chandrika, ch. XII., pl. 9.

(4) Mitaks., ch. I., sec. XI., pl. 28, 33, sec. I., pl. 3, sec. V.

(5) L. K. 2 Ind. Ap. at p. 279.

(6) See also Peacock, C.J., in *Khetraimani Dasi v. Kashinath Das*, 2 Beng L. K. at p. 34, A. J. C.

(7) See Coleb. Dig., bk. V., ch. VI., pl. 379, Comm.; 2 Macn. H. L., 114; 1 West and Bühler, bk. I., ch. II., sec. I., Q. 2.

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She has been pronounced entitled to a provision out of her husband's property, given or bequeathed by him to another (Q. 1837 M. S. Surat 5th June 1847). But the joint tenancy, under the Mitakshara, of the sons with their father giving them an ownership antecedent to the rights of the widow as such, not as in Bengal[1] coming into existence only at the same moment with those rights, they may be here regarded by the subtlety of the Hindu lawyers as holding a more completely untrammelled power of dealing with the estate without regard to the widow's claims, however subject they may be to moral reprobation should they needlessly dispose of it, and however impossible it may be for them to escape a personal liability for the widow's maintenance.[2] Thus in the case at 1 West and Bühler, 24, Q. 5, the shastri denies to a step-mother any right even in the paternal house as against her step-son. At 2 West and Bühler, 31, Q. 4, is a case of a creditor of a son seeking to enforce his decree against a house inherited by his debtor from his father. The widow set up a claim to a moiety of the dwelling, but the shastri's answer is: "A son after the death of his father, acquires a perfect right to his property, and while sons are alive the widow has no claim to his property. She cannot, therefore, claim any share of the house." It seems opposed, therefore, both to the text of the Mitakshara and to the constructions of the local interpreters to regard the widow's maintenance as "a charge on the inheritance" taken by the sons in the sense of a perfect right *in re*. At the same time, as the maintenance, even of a concubine, "is a burden placed upon (the estate) by Hindu law,"[3] which may properly be secured by an investment or other secure provision under the direction of the Court, the widowed mother or step-mother may demand, at least, an equal protection. Her right, then, though resting on a somewhat different theory, appears, on the whole, to stand practically on the same level here as in Bengal. "The widow's claim to maintenance from her husband's estate," Mr. Ellis says, "is absolute, unlimited by circumstances; but then it is only a claim

(1) Dayabhaga, ch. I., pl. 12-14.

(2) See Narada in 1 West and Bühler 355; 1 Str. H. R. 172

(3) See *Vrandavandas* v. *Yaumunabai*, 10 Bom. H. C. Rep. at p. 232 *Khemkor* v. *Umiashankar*, *Ibid.* 381.

to maintenance, and it is not correct to say that she is entitled to any share or division."[1] The sons taking the property subject to the burden of maintaining the widow, are in a position bearing some analogy to that of a husband becoming owner at law of his wife's property, but bound to provide for her support. The origin of the obligations, no doubt, is quite different; but, in the relations to which they give rise between the parties and in their bearing on the property, they seem to be very nearly alike. If, then, a mother, foregoing her claim to a separate provision out of the paternal property, resides with her sons or step-sons, and is maintained by them, she must submit, I think, to their dealing with the estate. A fradulent alienation for the purpose of defeating her claims, as pointed out by Sir G. Turner, V.C., in the case of a wife (in *Tidd* v. *Lister*[2]), will not be supported; but the particular assignee for value aquires under such circumstances a complete title not impaired, like that of the assignee in insolvency, by the then obvious incapacity of the insolvent son to support out of the estate those whose maintenance is a charge on it. The charge must, I think, be regarded as an equitable one or a special kind, enforceable in all cases in which the mother or step-mother living apart is not maintained by the sons, but not in other cases except under circumstances which affect the good faith of a transaction by which it is sought to get rid of the burden.

In the case of a widow of an ordinary co-parcener as against the surviving brothers or cousins forming the joint family, her identity with her deceased husband[3] cannot be considered less than where the husband was separated from his brethren and has left sons. But the right of the widow rests on different texts Katyayana, as quoted in the Vyavahâra Mayukha,[4] says: "In an undivided family, if the husband have died, the widow obtains maintenance or a share of the property for her life."[5] The

(1) 2 Stra. H. L. 307.

(2) 10 Hare 140. (3) 1 Mad. H. C. Rep. 475.

(4) See 1 West and Bühler 9, and Coleb. Dig., bk. V., ch. VIII., pl. 481, Comm.; Smriti Chandrika, ch. XI., sec. I., pl. 35.

(5) Svaryâte svâminî strî tu grâsâchchhâdanabhâgini.
Avibhakte dhanâns' an tu prâpnotyâmaranântikam.

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passage of Narada[1] to a similar effect applied by the Vyavahâra Mayukha [2] to the widows of unseparated and of reunited brethren, is by the Mitakshara[3] limited to the latter class; but Vijnyáneshwara refers to it, not for the purpose of cutting down the widow's advantages, but in order to support her right to complete inheritance. His antagonist desiring to reduce her to a mere maintenance in all cases, he contends that the passage relied on cannot extend beyond the widows of reunited brethern; but as he admits the claims of the wives and daughters of disqualified persons [4] and of the concubines of one deceased to provision,[5] which in the latter case is directed to be made by the king, succeeding as *ultimus hæres*, by "excluding or setting apart a sufficiency for the food and raiment of the women," it follows *à fortiori* that he could not have meant the widow of one who had actually held as a qualified co-parcener to be left destitute, or dependent on the mere caprice of tne survivors of her husband amongst the males of the united family. The passages in Manu[6] which forbid a woman to make a hoard[7] out of the common property, and reserve from partition only the ornaments usually worn by her, being immediately followed by an enumeration of the males disqualified for inheritance, and an injunction that all are to be supported, that injunction is in all probability meant to extend to the widows disqualified by their sex as well as the brethren excluded by their defects. Narada distinctly impo-

(1) Bhrâtṛiṇâmaprajâh preyat kaschichchet pravarajeta vâ,
Vibhajeran dhanan tasya s'esháste strîdhanam vinâ.
Bharaṇañ châsya kurvîran strínâmájîvanakshyât,
Rakshanti s'ayyâm bhartus' chedachchhidyuritarâsutvitî,

"Among brothers, if any one die without issue, or enter a religious order, let the rest of the brethren divide his wealth, except the wife's separate property. Let them allow a maintenance to his women for life, provided these preserve unsullied the bed of their lord. But if they behave otherwise, the brethren may resume that allowance." (Borr. ch. IV., sec. VIII., pl. 6.)

(2) Ch. IV., sec. VIII., pl. 6. (3) Mitaks., ch. II., sec. I., pl. 20.

(4) Mitáks., ch. II., sec. X., pl. 13, 14. (5) Mitaks., ch. II., sec. I., pl. I.,27, 28.

(6) Ch. IX., pl. 199, 200.

(7) The word "nirhara" is by the Viramitrodaya, 2 West & Bühler 74, and the Vyav. May., ch. IV., sec. X., pl. 8, construed "expenditure;" but the translation of Sir W. Jones and Colebrooke Dig., ch. V., text 474, seems to agree best with the context as well as with the ordinary use of the word.

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ses [1] the duty of maintenance on the brethern, and there is no indication that Vijnyáneshwara, in assigning to the widows under some circumstances more than this, intended in any case to allow them less. He seems rather to have taken it for granted that no question could arise in the case of the widow of a deceased member of a joint family, and the passage cited in the Mayukha is a mere explication, not an extension, of the doctrine of the elder authority. This right to maintenance under the Mita kshara law takes the place of the general right to an actual possession of her husband's share, which, as we have seen, is allowed by the Dayabhaga, notwithstanding the subsistence of a state of union between the deceased and his brethren. Yet, as in the division of an estate by co-parceners there is no express injunction to assign an aliquot portion to any widow except the widow of a father, a distinction may be taken, and has been pressed upon us, as to her rights in ordinary cases anterior to division, which it is argued are of a merely personal kind against the surviving co-parceners. The text of Katyayana, which we have already quoted, is against this contention, and Sir T. Strange says that in every case "an allowance .... proportioned to her support.....with a reference to the amount of the property so as, at the utmost (as has been said), not to exceed a son's or other parcener's share," is to be made to her, and that "care should be taken to have it secured. [2] He thus places the widow of the ordinary co-parcener apparently on exactly the same level with a mother seeking maintenance from her sons. His language is adopted in the case of *Sakvarbái* v. *Bhavanji*,[3] though with the less weight for other cases, as the question there in controversy was between a widowed step-mother and her step-son. The case of *Rámchandra Savitribái*,[4] already referred to, is in itself more decisive in recognizing the widow's right generally as a charge; but one of

[1] Nárada, Pt. 2, ch. 13, slokas 26, 28 :—

For sloka 26, *vide* note [1] *supra*, page 512.

Sloka 28, Mrite bhartaryaputrâyâh patipakshah prabhuh striyâh,
Viniyogâtmarakshâsu bharane cha sa is'varah.

"When the husband is deceased, his kin are the guardians of his childless widow; in disposing (of her) and in the care of her, as well as in her maintenance, they have full power." (1 West and Bühler 355.)

[2] 1 Strange H. L. 171.

[3] 1 Bom. H. C. Rep. 198.

[4] 4 Bom. H. C. Rep. 73, A. C. J.

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the learned Judges who gave that judgment declined afterwards, as we have seen, to recognize its apparent import. In *Rázábái Sádu*,(1) a widow having been sued by her husband's heirs for his property in her possession, this Court, though it appeared that the deceased had made a will in favour of the plaintiffs, directed in remanding the case that an award of maintenance to the widow should be included in the decree. On the other hand, it was ruled by the late Sadr Court in *Bhugwunt Goozábaee*(2) that a decree for maintenance obtained by a widow against her husband's brother did not prevent his selling with a good title his share in the family dwelling so as to exclude her claim upon it. This decision agrees in principle with one reported at N. W. P. Rep. for 1860, p. 447 ; but it is opposed to that at 2 N. W. P. Rep. 134, which says that, though "the widow is bound to look to the heir for her maintenance and to claim it from him primarily rather than from the estate transferred or wasted," yet the estate "may nevertheless be in the last resort answerable to her claim." The decision of the Bombay case, it may be observed, was opposed to the opinion of the Shástri at Sholápur, and the sale was by one brother to another, so that the widow's right to residence may have been supposed to have remained unaffected. Otherwise the case is opposed to that of *Mangála Debi* v. *Dinánáth Bose*,(3) and to that of *Gauri* v. *Chandrámani*,(4) to which we have already referred, as well as to the Bombay decisions referred to by Sir B. Peacock in *Mangála Debi's* case.

The right of the widow of a deceased co-parcener to maintenance as a charge on the estate in which her husband had a share as well as against the co-parceners personally who have taken that share, has been recognized in several cases by the High Court at Calcutta. In *Anand Moyee* v. *Gopál Chandar Bánerji*(5) it is said of the widow resisting the purchaser from a surviving co-parcener : "There may be other property in the hands of Dwarkánáth out of which that maintenance can be derived, and if there is no other, there is nothing to prevent her from suing to establish her right to make her maintenance a charge upon the property purchased by the plaintiff." In *Mussamut Khukroo Misrain* v.

(1) 8 Bom. H. C. Rep. 98, A. C. J.
(2) 8 Harr. 120.
(3) 4 Beng. L. Rep. 72, O. C. J.
(4) I. L. R. 1 All. 262.
(5) Calc. W. R. for 1864, 310.

Jhoomuck Lall Dass,[1] a case from the Mithila District, a widow sued to enforce an equity of redemption which she said had descended to her in succession to her husband, who she alleged had died separated from his brethren. This fact was found against her, and the Court say: "But with the finding that her husband "died a member of the joint family, all her claim disappeared, and "she has no interest whatever in the family estate. It has been "contended that her claim for maintenance is a charge on the "estate, and that therefore she has an interest in keeping the "estate in the family; but as a matter of fact change of ownership "would not affect her lien, and if she failed in getting her main-"tenance from the members of her late husband's family she could "make the estate chargeable with it into whose hands soever it "had fallen under the foreclosure." The doctrine laid down in these passages appears to be substantially identical with that of the High Court of Allahabad to which I lately referred. It apparently involves the inconvenient consequence of subjecting the ownership acquired by a purchaser to a sort of springing use dependent on the solvency of his vendor and the honesty of the vendor and perhaps several other persons. No authority, so far as I can recollect, is to be found for such an estate subject to a right so uncertain and so calculated to injure the value of property. Either the land can be sold or it cannot, and only rights in existence at the time or certain to come into existence on the expiration of some particular estate, are recognized in derogation of the ownership. The widow's claim being strictly to maintenance and maintenance only, without any defined share in the estate even on partition, and the kind of maintenance even that she can claim being dependent on the perhaps fluctuating circumstances of the joint family,[2] it appears that although she may at her will get her claim recognized as chargeable on the estate in the hands of the co-parceners reduced to certainty, and secured as a specific charge on the estate, or, as Katyayana says, by "the allotment of a share for her life,"[3] yet if she should refrain from that course in

(1) 15 Calc. W. R. 263.

(2) See *Ramlál* v. *Lakmichand*, 1 Bom. H. C. Rep. 51, App.: *Johurra Bibee* v. *Sreegopal*, I. L. R. 1 Calc. 470.

(3) See *Rampershad Tewárry* v. *Sheochurn Dass*, 10 Moore's I. A. 490. The right of the ordinary co-parcener's widow, either before or after partition, is still only to maintenance, not to a share, as in the case of a mother.

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the hope of sharing the improving circumstances of the family or through mere carelessness, she leaves to the co-parceners an unlimited estate to deal with at their discretion, and must share their ill as well as their good fortune. The case of *Rámlál* v. *Lakmichand* (1) affords an analogy on which this proposition may be rested. If, indeed, there should be an alienation or wasting of the property for the very purpose of depriving her, and possibly others in the like situation, of their subsistence, such a proceeding being a fraud upon persons whom the Hindu law, like the English, regards as deserving a special protection, and being in direct opposition to the precept which forbids the alienation of that which is needed for the sustenance of the family, would be pronounced invalid, or subject to revision in the interest of the persons thus prejudiced. The analogy of the English law as to debts chargeable on the estate taken by an heir is but very partially or not at all applicable. According to that law, a liability for debts does not constitute a charge on lands before a judgment is obtained against the heir of a deceased, and ranks subsequent to any alienation, even equitable, to a *bonâ fide* purchaser or mortgagee (*British Mutual Investment Company* v. *Smart* (2)), because this liability being a creation of the law can extend no further than its clearly-defined scope; and a debt is not by the English Courts regarded as binding the debtor's conscience so as to make it inequitable to deal with his property as he can. Even the charge created by a prior judgment has not the effect of binding the property, however capable of being made an interest *in re*, and ranks subsequent to a later judgment which is first registered (*Benham* v. *Keane*).(3) Now, indeed, under the statute 27 & 28 Vic., c. 112, sec. 1, a judgment-creditor acquires no charge on his judgment-debtor's land until he has taken it in execution. It cannot be said that under the Hindu law the heir's or surviving co-parcener's conscience is not affected by the widow's claim to maintenance out of the estate he has taken. It is the object of a direct injunction; and the purchaser, who joins him in defeating that provision, may properly be himself made subject to

(1) 1 Bom. H. C. Rep. at p. 51, App.

(2) L. R. 10 Ch. App. 567.

(3) 31 L. J. Ch. 129.

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the charge.(1) If there is an ample estate out of which to provide for the widow, so that she may still get her claim fixed and secured, or if knowing of the proposed sale, she does not take any step to secure her own interest, no imputation of bad faith, or of abetting it, can be made against the purchaser of a portion of the joint-property. If the widow, on the other hand, is not accepting support from the co-parcener in satisfaction of her claim; if she lives apart, and the estate is small and insufficient, it is the vendee's duty before purchasing to inquire into the reason for the sale, and not by a clandestine transaction to prevent the widow from asserting her right against the intending vendor.

It is in this connexion that the doctrine of notice becomes of importance, and thus in *Srimati Bhagábati Dási* v. *Kanailál Mitter*,(2) Phear, J., says, the widow "may also, doubtless, follow the property for [her maintenance] into the hands of any one who takes it as a volunteer or with notice of her having set up a claim for maintenance against the heir." The distinction taken between the volunteer and the alienee for value rests rather on English than on Hindu notions; and for "notice of her having set up a claim" we should rather substitute "notice of the existence of a claim likely to be unjustly impaired by the proposed transaction;" but, in so far as notice is recognized as making an important difference, the principle is correct and important. It is said, further on in the same judgment, "when the property passes into the hands of a *bonâ fide* purchaser without notice, it cannot be affected by anything short of an already existing proprietary right; it cannot be subject to that which is not already a specific charge, or which does not contain all the elements necessary for its ripening into a specific charge." If this is to be applied to the Bombay Presidency, it may be said that the widow's claim in every case does "contain all the elements necessary for its ripening into a specific charge:" it only needs formal assertion to obtain recognition. But, nevertheless, I do not think it can be called an "already existing proprietary right." Under the English law the knowledge of collateral rights frequently qualifies

(1) See per Wood, V.C., in 31 L. J. Ch. at pp. 134, 135, and per Turner, L. J., *ib.*, at p. 139.

(2) 8 Beng. L. R. at p. 228.

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those acquired by a purchaser; there is a class of cases, for instance, of which it is said that "where the right comes into existence by covenant, the burden does not, at law, run with the servient tenement; but equity says that a person who takes it with notice that a covenant has been made, shall be compelled to observe it" (per Mellish, L.J., in *Leech* v. *Schweder*. (1)) In the case we are considering, the right does not come into existence by covenant, but it is a right maintainable against the holders of the ancestral estate in virtue of their holding, no less through the operation of the law than if it had been created by agreement; and so, when the sale prevents its being otherwise satisfied, it accompanies the property, as a burden annexed to it, into the hands of a vendee with notice that it subsists. Equity, as between the vendee and vendor, will make the property retained by the latter primarily answerable; but such property there must be to make the sale and purchase free from hazard where the vendee has knowledge or the means of knowledge of a widow's claim that cannot be satisfied without recourse to what he proposes to buy.

In *Baboo Goluck Chunder Bose* v. *Ránee Ohillá Dáyee*, (2) it is said: "It has been settled by more than one decision of this Court that when a purchaser purchases property from the heir with notice that a Hindu widow is entitled to be maintained out of it, the property in the hands of the purchaser continues to be charged with that maintenance," and to this the court add an opinion that "it is not a correct proposition of Hindu law to say that in all cases a Hindu widow is not entitled to follow the properties from which she is entitled to obtain her maintenance in the hands of the purchaser, unless she at first attempts to recover her maintenance from the heir at law." In this latter statement, if it be taken strictly, I concur; but I think that, whether the property purchased is subject or not subject to the charge, depends on the conditions which I have already considered. The law steps in only to counteract what it regards as a furtherance of an unconscientious attempt to evade a sacred duty.

The Court, in the case just referred to, declined to entertain the question of whether the widow's claim for maintenance was sub-

(1) L. R. 9 Ch. App. at p. 475. (2) 25 Calc. W. R. 100.

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ordinate to the debts binding on the family. Even in the case of a mother, however, her share, like that of a son, is intended to be fixed on a division of the property after the family debts have been paid.(1) Much more is this the case with the widow of an ordinary co-parcener, who can never demand any precise aliquot share at all, only sustenance according to the means of the family. Those means are not, in honesty available except with a deduction for debts unpaid. This principle is properly insisted on in *Adhirânee Nárain Coomáry* v. *Shoná Máli*.(2) The case of *Gangábái* v. *Sitárám*(3) might have been disposed of by reference to the same principle. There the ancestral house had been sold for debts, and the claim was one, as the Court say, "which the son himself, if alive, could not have resisted." This being so, it was not necessary, I think, to place the decision on what seems to me the more than doubtful ground, that a daughter-in-law cannot claim maintenance when the father-in-law has sold the ancestral property.(4) A passage from the Viramitrodáya is quoted in support of the judgment, which I have not, for want of a precise reference, been able to verify, but which is probably a repetition merely of the common maxim "He who takes the property (where there is property) shall bear its burdens."(5) That surviving co-parceners, by merely selling the estates or changing its form, should be able to get rid of the obligations properly attached to it(6) would be a premium on trickery opposed equally to the spirit of the Hindu as of the English law. In *Srimati Bhagabati Dási* v. *Kanailál Mitter*,(7) already referred to, this point is touched on; "and obviously," according to Phear, J., "the consideration received by the heir for the sale of the deceased's property will, so far as the widow's right of recourse to it is concerned, take the place of the property sold." It will take its place so long as it remains undissipated; but as "the Hindu wife, upon her marriage, passes into and becomes a member of (her husband's) family, it

(1) 2 West and Bühler, Introd., pp. 28, 36. (2) I. L. R. 1. Calc. 365 at p. 377. (3) I. L. R. 1 All., 170.

(4) See Colebrooke in 2 Str. H. L. 412, and the judgment of the Privy Council in the case of *Sri Virádá Pratapa Raghunádá Deo* v. *Sri Brozo Kishoro*, I. L. R. 1 Mad. at page 81; Agra Sadar Reports for 1859, p. 52, and for 1863, p. 638; Mad. Sadar Reports for 1849, p. 5.

(5) Nárada, Pt. I., ch. III, sloka 18; Pt. II, ch. XIII, slokas 26-27.

(6) See 7 N. W. P. H. C. Rep. 261 (F. B.) (7) 8 Beng. L. R. 225.

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is upon that family that, as a widow, she has her claim for maintenance" (per Judicial Committee in *Sri Virâdá Pratápá Râghunádá Deo* v. *Sri Brozo Kishoro Patt Deo*,(1) and her right is not extinguished by any wilful or negligent diminution of the means of satisfying it.

But while this right to maintenance out of the family property and at the hands of the surviving co-parceners may at all times be exercised as against them, I find a difficulty in accepting the doctrine that it depends on how the widow's claim may be or can be met, whether she can have recourse to property already sold or mortgaged to provide her with subsistence. I have already discussed some of the cases bearing on this question. In the able judgment of L. Jackson, J., in *Adhiránee Nárain* v. *Shoná Máli*(2) that learned Judge, while holding that the widow's lien (for such it is called) for maintenance does not affect the estate in the hands of a purchaser without notice of it, further lays down that it operates only on failure of property of the deceased in the heir's hands. The laws of inheritance applicable to the particular case which was before the learned Judge may have varied somewhat from the ordinary rules; but I should hesitate to recognize as a principle generally applicable that "it lay upon her (the widow) to show that his estate (that of the Raja who had succeeded her husband) has been exhausted before she could come upon the property in the hands of the first defendant,"(3) and still more the converse proposition that its exhaustion would create for her a new right. What was honestly purchased is free from her claim for ever: what was purchased in furtherance of a fraud upon her, or with knowledge of a right which would thus be prejudiced, is liable to her claim from the first. The relations of the parties are determined once for all at the moment of the sale.

Amongst the cases pressed on us at the hearing was that of *Khetrámáni Dási* v. *Kashináth Dás*.(4) In that case it was ruled that a widow of a son who had died without property was not entitled to a separate maintenance from her father-in-law. The question was one under the Bengal law, according to which the

(1) I. L. R. 1 Mad. at p. 81.
(2) I. L. R. 1 Calc. 365.
(3) *Ibid.* at p. 398.
(4) 2 Beng. L. R. 15, A C. J.

son, not becoming by his birth a joint owner with his father of the ancestral estate, stands on a different footing from that which he occupies under the Mitakshara. Under that law the daughter-in-law's right to maintenance, out of the estate which her husband shared, has been recognized in many cases.(1) She seems to stand towards the father-in-law in the position of an ordinary widow of a deceased co-parcener to his survivor, and thus the cases relating to her rights serve to define and illustrate those of the whole class. I cannot find either that the father, restored to his position of sole owner by his son's death, is prevented from giving, in all ordinary cases, a perfectly good title to the property which he chooses to sell, or that he can get rid of the obligation of maintaining his daughter-in-law out of it while it exists, and in spite of its non-existence, if he has chosen to waste it. In the same case, Phear, J., delivering the judgment of himself and of Jackson and Hobhouse, JJ., says that the maintenance of persons excluded from a share ranks as a real charge on the inheritance, while that of the daughter-in-law is no more than a moral obligation. But precisely the same word "*bhartavyam*" is used by Yajnavalkya to express the claim of these persons and of their wives, and the same verb is used to express the right to support of a deceased co-parcener's widow in Nárada.(2) If, then, the sustenance of persons entitled to no definite share is an indefeasible charge in the one case, it must apparently be so in the others. In all, as it seems to me, it is a claim to maintenance merely(3) not interfering, so long as it has not been reduced to certainty by a legal transaction, with the right of the actually participant members to deal with the property at their discretion, provided this dealing is honest and for the common benefit. The case at 1 West and Bühler, 286, Q. 4, is not stated with enough of circumstance to enable us to say whether the debt for which a decree had passed against the active brethren was one incurred in fraud of the lame brother's right. If it were so incurred, the property should apparently be charged to a reason-

(1) See *Visalatchi* v. *Annasamy*, 5 Mad H. C. R. 150; *Kumla Buhoo* v. *Mune-shunker*; 2 Borr. at p.749, 750; 1 West and Bühler, 10, 18, No. 287; *Mussamut Lalti* v. *Ganga Bishaw*, 7 N. W. P. Rep. 261.

(2) Pt. II., ch. XIII., sloka 23.

(3) See Manu, ch. IX., pl 202; Narada quoted in the Smriti Chandrika, ch. XI., sec. 1, para. 34; and Katyayana in the Vivada Chintamani, p. 261.

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able extent for his maintenance; if not, his rights would be limited to a claim on his brethren and the property remaining in their hands. The Shastri has quoted as an authority only the passage from Yajnavalkya given in the Vyav. May., ch. IV., sec. XI., pl. 1, which is cited also in the Mitakshara,(1) whence it may be inferred that no passage more directly supporting his opinion could readily be found. Question 6, at page 288 of the same work, is answered to the effect that a dumb or mad man may claim a maintenance from the ancestral property, but the authorities cited are still only those that we have considered. In the case of an idiot or lunatic, the special guardianship assigned by Hindu law to the sovereign would probably justify a greater intervention of the Courts than would be proper in other cases; but on the exact extent to which this intervention could be carried it is not necessary to express an opinion.

The right of a co-parcener's widow being such as we have seen against the surviving co-parceners, and, under circumstances against the common property the question has lastly to be considered of whether the reduction of the survivors to a single one makes any difference in the widow's legal position. Where the claimant of maintenance is a mother, or even an unmarried sister of the co-parceners, and thus entitled on partition to a definite share,(2) it is necessary, as we have seen, that a share should be assigned to her in the division of the common property. And as a judgment-creditor of a single member can work out of his decree only by means of a partition, the rights of the widow are thus effectively preserved. As is said in *Srimati Soorjee Money Dási* v. *Denobundoo Mullick*,(3) "Those who come in the place of the original co-sharer by inheritance, assignment, or operation of law, can take only his rights as they stand, including, of course, the right to call for a partition." Though the judgment was afterwards reversed by the Judicial Committee, this principle was not questioned,(4) and in *Ramchandar Dutt* v. *Chander Coomar Mundul*(5) it is said that the alienation of the

(1) Ch. II., sec. X., pl. I.
(2) Mitak. ch. I., sec. VII., pl. 2, 14; 2 Strange H. L. 311.
(3) Boulnois, 228. (4) 6 Moo. Ind. Ap. at p. 539.
(5) 18 Moo. Ind. Ap. 198.

shares of two out of three members, by mortgage and foreclosure, merely substitutes the status of joint ownership for that of an undivided family,—a status, as the Judicial Committee say, "only to be determined by an actual partition or an agreement by mutual consent to divide." In such a division the mother's or sister's share would be set apart and preserved, after provision had been made out of the aggregate for debts properly incumbent on the whole family. In the case even of co-parceners, not having a mother or sister to provide for, it has, as we have seen, been definitely ruled that the Court in decreeing a partition may properly assign an adequate portion to the widow of a deceased co-parcener as a source of subsistence during her life (*Rámpershad Tewárry* v. *Sheochurn Doss*). (1) When, therefore, the creditor of a single co-parcener, amongst a group of first or second cousins, seeks through an enforced partition to obtain satisfaction of his separate debt, the widow's claim may well be recognized, and due provision made to meet it. But it is clear that such a group is not obliged, in a voluntary partition, to allot a part to the cousin's or brother's widow as a co-sharer. Her right remains after the division what it was before it,—a right to maintenance and nothing more, or, at most, should she advance a definite claim, to a provision, determined according to circumstances, out of the property. And as in a dwindling brotherhood the rights and obligations of four members become those of three and of two, so do those of the two fall at last to the sole survivor. The widows must be maintained by him out of the property that has become burdened with that incumbrance; but he is not, therefore, fettered in dealing with the estate at his discretion, in the absence of actual fraud or of a decree which has converted some widow's claim into an actual right *in re*. The purchaser from him, as in the familiar case of a sale by a father-in-law, takes a perfectly good title, and one which, if good at the time, cannot be impaired by subsequent changes in the circumstances of the vendor's family.

In the present case, we have it found as a fact that the purchaser Lakshman (defendant No. 2) was aware of the existence and of the claim to maintenance set up by the widow (now plaintiff)

(1) 10 Moo. Ind. Ap. 400.

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Satyabhámábái) of the brother of the vendor Máhádev. It is part of his case that the property was first mortgaged and afterwards sold to him to raise funds for the discharge of debts contracted by the deceased husband of the plaintiff, and for the satisfaction of a decree for maintenance obtained by Satyabhamábái against the vendor Máhádev. If mere notice, therefore, of the existence of an undivided brother's widow, and of a claim to maintenance set up by her, was sufficient to bind the ancestral property under all circumstances and as against all other claims, the judgment of the District Judge in favour of the plaintiff should be unreservedly upheld. He has awarded her maintenance out of the property in the hands of Lakshman and his vendee Vishnu at the rate adjudged to be proper in her former suit against Máhádev. But a full review of the law on this subject has satisfied me that the ground of decision taken by the Court below is too narrow. For proper reasons, as for the discharge of a debt incumbent on the family and on him as its sole surviving proprietary member, Máhádev might sell the estate which had thus vested in him. He could not thus affect the right of another co-parcener's widow Sarasvatibái, whose claim had by means of a decree become a right *in re* adhering to the estate; but the right of Satyabhámábái, not yet reduced to definitenes and made a precise and actual charge on the property, could not prevent his dealing with it at his discretion. If he sought to defraud her, he could not indeed by any device in the way of parting with the estate, or changing its form, get rid of the liability which had come to him along with the advantage derived from his survivorship; and Lakshman—taking from him with reason to suppose that the transaction was one originating not in an honest desire to pay off debts, or satisfy claims for which the estate was justly liable, and which it could not otherwise well meet, but in a design to shuffle off a moral and legal liability—would, as sharing in the proposed fraud, be prevented from gaining by it; but if, though he knew of the widow's existence and her claim, he bought upon a rational and honest opinion that the sale was one that could be effected without any furtherance of wrong, he has, as against the plaintiff, acquired a title free from the claim which still subsists in full force as against the recipient of the purchase-money,

Máhádev : *Dabee Rawoot* v. *Heeramun Muhatoon.*(1) As to Vishnu, the sub-purchaser of part of the property, the same considerations apply. He knew of Satyabhámábái's position and her claim. If, with this knowledge, he chose to purchase from Lakshman, himself but recently become vendee, he took the property with the same risks as Lakshman. If he acted in good faith and with due care, he is entitled to protection for his purchase.

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These being the principles on which the case ought to have been disposed of, and the question of notice, except as an element of the larger question of whether Satyabhámábái's interests were fraudulently touched by Lakshman's purchase, not being determinative of the rights of the parties, I think that the decision of the case solely by reference to that question in the Court below is to be regarded as having shut out the consideration of the really decisive issues. Was the sale justifiable under the circumstances ? Was it unfairly prejudicial to Satyabhámábái's rights or remedies ? Was Lakshman's and was Vishnu's purchase made under such circumstances that the property passed to each or either of them exonerated from the liability to support Satyabhámábái with which it was burdened in the hands of Máhádev ? That these questions may be dealt with in the form prescribed by my Lord the Chief Justice, we must reverse the decree of the District Court, and remand the cause for re-trial and a new decree on the merits.

Decree reversed and case remanded.

(1) 8 Calc. W. R. 223.

[APPELLATE CRIMINAL.]

Before Sir M. R. Westropp, Kt., Chief Justice, and Mr. Justice Melvill.

IMPERATRIX *v.* BHAWANI BIN PANDUJI AND SAKHARAM BIN KHUNDOJI.*

1878. *February* 14.

Criminal Procedure Code (Act X. of 1872), *Section* 263, *Clauses* 4 *and* 5—*Dissent of Court from verdict of jurors.*

The "dissent" referred to in the 4th clause of section 263 of the Criminal Procedure Code (Act X. of 1872) must be such a complete dissent as to lead the Judge to consider it necessary for the ends of justice to submit the case to the High Court.

THE prisoners Bhawáni and Sakhárám were tried by a jury before H. Phillpotts, Acting Sessions Judge of Poona, on a charge

* Criminal Appeal No. 15 of 1878.

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IMPERATRIX v. BHAWÁNI BIN PANDUJI AND SAKHÁRÁM BIN KHUNDOJI.

of forgery under section 469 of the Indian Penal Code. The jury, by a majority of 4 to 1, found the prisoners guilty of the offences; but the Sessions Judge disagreed with their verdict. He, however, convicted the prisoners, and sentenced them, each, to suffer rigorous imprisonment for a period of three years. His finding contained the following passage :—"The Court disagrees with the verdict of the majority. But, as it is entirely a case depending on the appreciation of the evidence and the habits and customs of the natives, and as they must be more familiar with the motives which actuate these people, and what they would be likely to do, than a foreigner, the Court will not send up the case under section 263."

The prisoners appealed to the High Court.

Shámrav Vithal for the prisoners :—The Sessions Judge, having disagreed with the verdict of the jury, ought to have submitted the case to the High Court, as required by clause 5, section 263 of Act X. of 1872. His omission to do so rendered the conviction and sentence illegal. They must, therefore, be set aside. The learned pleader referred to *Imperatrix* v. *Hari Ghanu*.(1)

Nánábhái Haridás (Government Pleader) appeared for the Crown.

PER CURIAM :—This case depends upon the 4th and 5th clauses of section 263 of the Criminal Procedure Code. These clauses are not very clearly drawn; but taking them together, as we are bound to do, in order to ascertain the meaning of the Legislature, we think that the "dissent," spoken of in the 4th clause, must be

(1) In this case, the prisoner Hari Ghanu was tried by a jury before A. Phillpotts, Acting Sessions Judge of Poona. The jury returned a verdict of not guilty, with which the Sessions Judge disagreed. He, however, acquitted the prisoner (16th November 1877), but did not think it necessary to refer the case to the High Court, under section 263 of Act X. of 1872. The Government of Bombay thereupon preferred an appeal against the Sessions Judge's order of acquittal, and the High Court (Westropp, C. J., and Melvill J.) admitted the appeal, holding that Government had a right to appeal against an acquittal by a jury, where the Judge differed from the jury, although he did not consider it necessary to submit the case to the High Court. On the receipt of the record of the case, the High Court (Melvill and Kemball, JJ.), on the 21st March 1878, found on the evidence the prisoner guilty of the offence charged, and sentenced him to transportation for life.

such a complete dissent as to lead the Judge to consider it necessary for the ends of justice to submit the case to the High Court. There being no such complete dissent in his case, we think that the conviction and sentence must stand. This decision is not in conflict with our decision in *Imperatrix* v. *Hari Ghanu*, where we held that Government might appeal against an acquittal by a jury where the Judge differed from the jury, but did not consider it necessary for the ends of justice to refer the case to the High Court.

Conviction and sentence upheld.

[APPELLATE CRIMINAL.]

Before Sir M. R. Westropp, Kt., Chief Justice, and Mr. Justice Kemball.

In re TUKARAM VITHAL.*

February 21.

The Bombay District Municipal Act, No. VI. *of* 1873.

Non-compliance with notices issued by the Municipality under section 36 or clause 1 of section 39 of the Bombay District Municipal Act No. VI. of 1873 is not an offence punishable under the Act, as clause 1 of section 74 of that Act does not apply to either of those provisions. The latter clause applies only to the 2nd clause of section 39.

THIS was a reference, under section 296 of the Code of Criminal Procedure, by Willim Ramsay, Magistrate of the District of Násik, submitting, for the orders of the High Court, the proceedings of Ráv Sáheb Shridhar Gundo, Subordinate Magistrate, Second Class, at Násik.

In submitting the proceedings the District Magistrate said: "The Municipality of Násik, through their Secretary, brought a complaint against one Tukárám walad Vithal Kásár and another for failing to comply with a notice issued under clause 1 of section 39 of the Municipal Act by the Second Class Magistrate of Násik. The latter threw out the complaint (apparently under section 147 of the Criminal Procedure Code) on the ground that section 74, clause 1 of the Act, sanctioning penalties, applies only to the second clause of section 39, above quoted. The municipality, through their Chairman, have now appealed to me to use the power vested in me under section 298 of the Criminal Procedure Code, and direct the Subordinate Magistrate to take up the case again and try it.

* Reference No. 13 of 1878.

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"There being no issue of fact, but only one of law, it seems to me useless to order a re-trial of the same. My own view is, that section 74 of the Municipal Act mentions a definite penalty for breach of the provisions of section 39. Without mentioning or excepting either of its clauses, it must be held to be applicable to the entire section, and as this is opposed to the view of the case taken by the Subordinate Magistrate, I venture to submit the case for the orders of the Honourable the Judges of Her Majesty's High Court."

The notices issued by the municipality ran as follows:—

"You own in the city of Násik a house, No. 470, the drain of the privy of which house is open, and the privy itself has no doors. Therefore, within 15 days of the receipt of this notice you should build the drain of your privy and join it to Nánávivá and Kosár road under-ground drain, and take steps to put up doors to your privy. Herein fail not. Issued in accordance with the Committee's Resolution, dated 19th November 1877, to give notice under sections 36 and 39 of Bombay Act VI. of 1873."

The Second Class Magistrate made the following order:—

"The above notices were given by the municipality under sections 36 and 39 of the Municipal Act; but there are no penalties at all prescribed in section 36 and clause 1 of section 39.

"Section 75 of the Act prescribes that if any work is not done in compliance with the notice issued by the municipality, the municipality should do the same work at the expense of the owner.

"In section 74 of the Act are shown the penal sections. Section 36 is not at all among them. Section 39 only is included therein, because a penalty is prescribed in clause 2 of that section. The same, however, applies to works constructed against the directions of a municipality after the Act comes into operation. It is my opinion that section 33 is to be understood as included among the penal sections to the extent of clause 3 of that section, and that section 38 to the extent of the first part of clause 1 of that section.

"For the above reasons I cannot come to the opinion that non-compliance with the orders of a municipality, contained in notices

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In re TUKÁRÁM VITHÁL.

issued by it in regard to the making of any new works or alterations, is an offence under the law. I have, therefore, refused to entertain the complaint in respect to the above two notices."

No one appeared either to support or oppose the reference.

PER CURIAM:—The Court concur in the ruling and the reasons given for it by the Second Class Magistrate of Násik, Ráv Sáheb Shridhar Gundo, viz., that clause 1 of section 74 of the Municipal Act, Bombay, No. VI of 1873, applies only to the second clause of section 39 of the same Act.

Proceedings returned.

[APPELLATE CIVIL.]

Before Sir M. R. Westropp, Kt., Chief Justice, and Mr. Justice Melvill.

January 23.

VASUDEVANANT (ORIGINAL DEFENDANT), APPELLANT, *v.* RAMKRISHNA AND SHIVRAM NARAYAN (ORIGINAL PLAINTIFFS), RESPONDENTS.*

RAMKRISHNA AND SHIVRAM NARAYAN (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* THE GOVERNMENT OF BOMBAY (ORIGINAL DEFENDANT), RESPONDENT.†

Bombay Act II. of 1863, *Section* 6, *Clause* 2—*Non-recognition of adoption by Civil Court—Inam Commissioner's decision—Act XI. of* 1852.

The provision in Bombay Act II. of 1863, section 6, clause 2, as to non-recognition of adoption by any civil Court, relates only to the question of the assessability of lands when raised between Government and a claimant of exemption.

It is not open to a party to rely upon a provision of which Government only is entitled to take advantage.

In an enquiry under Act XI. of 1852 the *Inam* Commissioner, on the 30th January 1865, decided that a certain *inam* village should be continued to the male descendants of the original grantee; *held* that the decision of the *Inam* Commissioner was only intended to regulate the duration of the exemption of the *inam* village from assessment, and not to regulate the enjoyment of it as between the heirs of the original grantee.

THESE were cross appeals from the decision of R. F. Mactier, District Judge of Satara.

The facts, so far as they are material to this report, are these:—Rámkrishna, Vásudev, and Shivrám, the parties to these appeals, were the sons of Náráyan Dáji. Náráyan had an elder brother,

* Regular Appeal No. 15 of 1877. † Regular Appeal No. 35 of 1878.

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Anandráv, who, having no issue, adopted (as a son) Vásudev, Náráyán's second son. The village of Koliwádi was, in A.D. 1725, granted in *inam* to Rámchandra Govind, great-grandfather of Anandráv and Náráyán, and was successively held by Rámchandra's son and grandson. It was entered in the joint names of Anandráv and Náráyán after their father's death. Anandráv died in 1862, and the Collector of Satara entered the name of Vásudev as his (Anandráv's) heir and successor in respect of half the *inam* village. In an enquiry by the *Inam* Commissioner under Bombay Act XI. of 1852, that officer decided on the 30th January 1865 that the *inam* village should be continued to the male descendants of the original grantee. In March 1868, the Revenue Commissioner reversed the order of the Collector, and directed Vásudev's name to be removed from the Government books as holder of half the *inam* village. After several unsuccessful attempts, Vásudev presented a petition to Government for a re-consideration of his case; whereupon Government, on the 27th May 1872, reversed all the previous orders in Vásudev's case, and directed that his (Vásudev's) name should be entered in the *inam khata* of the village jointly with that of Náráyan, as had been the case before the Revenue Commissioner's orders. Rámkrishna and Shivrám, therefore, brought the present suit, claiming to be entitled to the whole *inam* village (including the half already in their enjoyment), and praying for possession of the half held by Vásudev. They based their suit on the ground that Vásudev had no claim to the *inam* village as Anandráv's adopted son, under Bombay Act II. of 1863, section 6, clause 2. They made Government a party defendant to the suit on account of its order of the 27th May 1872. One of the issues framed by the District Judge was, "does the fact of the defendant Vásudev, being an adopted son, bar his claim under Bombay Act II. of 1863, section 6, clause 2?" The Judge's finding on this issue was "that Vásudev, having been adopted, has lost his claim to share in this property, being debarred from succeeding in the line of his natural father by Hindu law, and in the line of his adoptive father by section 6, clause 2 of Bombay Act II. of 1863." The Judge awarded the plaintiffs' claim as against Vásudev, and dismissed their suit with costs as against Government.

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Inverarity (with him the *Hon'ble Ráo Sáheb V. M. Mandlik*) for Vásudev.

K. T. Telang (with him *Shántárám Náráyán*) for Rámkrishna and Shivrám.

Nánábhái Haridás (Government Pleader) for the Government of Bombay.

WESTROPP, C.J.:—We think that the decision of the *Inam* Commissioner of the 30th January 1865 was only intended to regulate the duration of the exemption of the village of Koliwádi from assessment, and not to regulate the enjoyment of it as between the heirs of the original grantee. There was not, in fact, any question then before the *Inam* Commissioner as to the right of Vásudev as adopted son of Anandráv. We are further of opinion that the provision in Bombay Act II. of 1863, section 6, clause 2, as to non-recognition of adoption by any civil Court, &c., relates only to the question of the assessability of lands when raised between Government and a claimant of exemption. Here Government has recognized Vásudev as the adopted son of Anandráv, has permitted him to hold the lands free from assessment, and admits his title. It is not open to the plaintiffs to rely upon a provision of which Government only is entitled to take advantage. As, for the foregoing reasons, we think that the plaintiffs must fail in this suit, it is unnecessary for us to consider whether the provision of Bombay Act II. of 1863, section 6, clause 2, as to non-recognition of adoption, is retrospective, *i.e.*, as to whether it is applicable to an adoption made before that Act came into force; or the question whether Náráyan, the original plaintiff, having given Vásudev in adoption to Anandráv, he (Náráyán) and his sons Rámkrishna and Shivrám, who claim through him, would not be estopped from disputing the right of Vásudev to succeed to Anandráv's moiety of the *inam* village. Upon these points we give no opinion. We reverse the decree of the District Judge, and dismiss the suit. We direct the plaintiffs, Rámkrishna and Shivrám, to pay the costs of the suit and of regular appeal No. 15; but as regards regular appeal No. 35 of 1877, we direct that the fees payable to the respective pleaders for the Collector in the District Court and in this Court be calculated on the sum of Rs. (130) one hundred and thirty, that being the amount which the stamp

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of Rs. (10) ten placed by the plaintiffs on their plaint and memorandum of appeal No. 35 of 1877, so far as they seek a declaration against Government, would cover.

Order accordingly.

[APPELLATE CIVIL.]

January 31.

Before Sir M. R. Westropp, Kt., Chief Justice, and Mr. Justice Melvill.

MUNSUK MOSUNDAS (PLAINTIFF) *v.* SHIVRAM DEVISING (DEFENDANT).*

Jurisdiction—Execution of a decree beyond the local jurisdiction of a Court of Small Causes in the Mufussal—Civil Procedure Code (Act X. of 1877), Sections 223 to 229 and Section 648.

Small Cause Courts in the Mufussal are not at liberty to execute decrees against moveable property beyond their local jurisdiction.

THIS case was referred for the opinion of the High Court by Cursetji Manekji, Judge of the Small Cause Court at Ahmedabed, under section 617 of Act X. of 1877.

The plaintiff had obtained a money decree in the Small Cause Court at Ahmedabad against the defendant, who resided at Dholka, and who had no property, moveable or immoveable, within the jurisdiction of the Court in which the decree was obtained. In execution of that decree the plaintiff applied for a certificate against the defendant's moveable property in Dholha. In submitting the case the Judge made the following remarks :—

"The question for the opinion of the High Court is,—has this Court power to grant a certificate against moveable property found beyond its local limits? I am of opinion that a Court of Small Causes has now no power to issue such a certificate.

"Under the old Civil Procedure Code (VIII. of 1859) the decree of a Court of Small Causes was capable of being executed against the judgment-debtor's moveable property out of the decree-making Court's jurisdiction (see an anonymous case in IX. Calc. W.R. p. 175 Civ. Rul.; and also *P. Venkatasubiá* v. *Sivárámáppá* (1)), and it has hitherto been the practice to issue certificates, under the pro-

* Small Cause Court Reference No. 127 of 1877.

(1) 4 Mad. H. C. Rep. 331.

visions of section 286 of Act VIII. of 1859, against moveable property beyond the jurisdiction of this Court.

"The present application, however, comes under the New Code (X. of 1877); and as sections 223 to 229, both inclusive, and section 648 (except as to arrest) of this Code do not apply to Courts of Small Causes, a person holding a Small Cause Court's decree is confined to such remedy only as is provided by section 20 of the Act constituting the Mufussal Courts of Small Causes (XI. of 1865).

"This section 20 is now the only law which provides for the execution of a Small Cause Court's decrees outside its local limits; and it empowers a Court of Small Causes, in certain cases, to issue certificates against immoveable property only. Therefore, I submit, a Court of Small Causes cannot now execute its decrees against the judgment-debtor's moveable property outside its own jurisdiction.

"This being so, a question arises as to whether this Court has power, under the said section 20, to issue certificates, even against immoveable property, where it is admitted that the judgment-debtor is possessed of moveable property outside the Court's jurisdiction, against which, as it appears, no execution could be had. This, however, is not the question now before me, and it need not be discussed at present.

"In this case the application is for a certificate against the judgment-debtor's moveable property at Dholka, outside the local limits of this Court. The judgment-debtor is not possessed of any immoveable property; so that the decree-holder is practically without remedy. This sort of cases will now be of frequent occurrence, as decrees in this Court will now be constantly made against defendants not resident within its jurisdiction.

"It will thus be seen that the New Code of Civil Procedure, whilst amplifying the scope of a Small Cause Court's usefulness, under section 17 neutralizes the same by curtailing the facilities for executing its decrees which such a Court hitherto possessed. It is not, however, for a Court of Justice to question or to consider the policy of the Legislature. I make these remarks simply with

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a view that perhaps the Honourable the High Court may think fit to represent the matter to Government, so that, by a short amending Act, the provision of Chapter XIX., Part A., of the New Code may be made applicable to Courts of Small Causes, as the corresponding provisions of Act VIII. of 1859 had been before. A Bill, if I mistake not, for amending one of the schedules of the New Code is even now before the Calcutta Legislative Council, and, if timely representation be made, the amendment here proposed might be included in it.

"The question for the opinion of the High Court is,—can a Court of Small Causes, in cases coming under the New Code of Civil Procedure, issue certificates against the *moveable* property of the judgment-debtor outside its own local limits?"

PER CURIAM:—Section 5 of Act X. of 1877 enacts that the sections of that Act, which are mentioned in the second schedule, shall be applicable to Courts of Small Causes in the Mufussal. We do not find in that schedule any of the sections from section 223 to section 229 inclusive, nor any portion of section 648, except that which relates to the subject of arrests, and we consequently have come to the conclusion that the Legislature has deliberately resolved that Small Cause Courts in the Mufussal shall not be at liberty to execute decrees against property beyond their local jurisdiction. Under these circumstances, we must answer the question submitted to us in the negative, and we decline to make any such representation to Government as suggested by the learned Judge of the Small Cause Court of Ahmedabad.

[APPELLATE CRIMINAL.]

Before Mr. Justice Melvill and Mr. Justice Kemball.

February 28. IMPERATRIX *v.* GOWDAPA BIN VENKUGOWDA.*

The Code of Criminal Procedure (Act X. of 1872), Sections 44, 142, 215, 295, and 296—Discharge—Revival of prosecution.

When an accused person has been discharged by a Subordinate Magistrate under section 215 of the Code of Criminal Procedure, and the Magistrate of the District, after calling for the proceedings, considers that the order of discharge

* Criminal Appeal No. 8 of 1878.

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was improper, the proper course for the Magistrate of the District to adopt is to refer the proceedings for the orders of the High Court, and not to order a new trial by another Subordinate Magistrate.

THIS was an appeal by the Government of Bombay under section 272 of the Code of Criminal Procedure against the order of C. F. H. Shaw, Session Judge of Belgaum, reversing, in appeal, the conviction and sentence passed by J. M. Campbell, Magistrate, First Class.

The accused Gowdápá was tried before Ráo Báhádur Rámchandra Bápuji, Magistrate, First Class, on alternative charges of giving false information, with intent to cause a public servant to use his lawful power to the injury of another person, and of giving false evidence in a stage of a judicial proceeding under sections 182 and 193, respectively, of the Indian Penal Code; and was discharged under section 215 of the Code of Criminal Procedure.

The District Magistrate, Mr. Spry, considering an order of discharge to be improper on the ground of its being opposed to the weight of evidence adduced in the case, called for the record and proceedings, professing to act under section 142 of the Code of Criminal Procedure, and referred them to Mr. Campbell under section 44, with a direction to re-try the accused person.

Mr. Campbell proceeded with the trial accordingly, and, finding the accused guilty of giving false evidence, sentenced him to six months' rigorous imprisonment.

Against this conviction the accused appealed to the Court of Session, which, without going into the merits, held the re-trial by Mr. Campbell to be *ultra vires* on the authority of the case of *Mohesh Mistree*,[1] and annulled the conviction and sentence.

Nánábhái Haridás (Government Pleader) for the Government:—The District Magistrate had power to direct a re-trial, although the accused had been discharged: see Explanation II. to section 215 of the Code of Criminal Procedure, adopted in the case of *Rámjoy Mozoomdár*;[2] *Jint Sáhoo* v. *Bheekon Roy*;[3] *Hari Singh* v. *Danish Mahomed*.[4] Under section 142 of the Code the interference by the District Magistrate is warranted, even though

(1) I. L. R. 1 Calc. 282.
(2) 14 Calc. W. R. 65 Cr. Rul.
(3) 18 Calc. W. R. 39 Cr. Rul.
(4) 20 Calc. W. R. 46 Cr. Rul.

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there may be no fresh evidence to weigh. Under this section the District Magistrate can take up any case on mere suspicion. If he had not such a power, Subordinate Magistrates might give perverse verdicts on evidence with impunity. The Government cannot appeal in such a case, for there is no acquittal; and the High Court cannot interfere, for there is no illegality. The result would be to render it impossible to cure failure of justice in case in a which a Subordinate Magistrate chose to discharge an accused person on evidence, which every other Magistrate in the Presidency would consider amply sufficient for a conviction. Mr. Justice Markby, in giving his judgment in *The Empress* v. *Donnelly*,(1) seems to have overlooked such a case as the above.

Mánekshâh Jehángirshâh for the discharged accused:—To warrant the revival of a prosecution against a discharged person, two things are necessary, viz., the Magistrate must be the same, and there must be fresh evidence. The cases of *Mohesh Mistree*(2) and *The Empress* v. *Donnelly*(3) are in point. The case of *Rámjoy Mozoomdár*(4) was a case under section 245 of the old Code, which does not correspond with section 215 of the new one. The case of *Hari Singh* v. *Danish Mahomed*(5) was a case of discharge and revival before the same Magistrate. Section 142 cannot be construed to empower the Magistrate of the District to take up any case under any circumstances. The Legislature, in enacting this section, was dealing with certain classes of Magistrates in regard to their capacity of taking up cases without a complaint. But it is clear that the cases here referred to are original cases, and not those coming under section 215. Section 296 deals with the latter class of cases, and it gives the power of revival to the Court of Session and the District Magistrate in Session cases only. Again, section 298, which empowers the High Court, the Court of Session, and the District Magistrate to order inquiry by express mention, restricts that power to dismissal under section 147, *i.e.*, in cases in which no process has issued. If the Legislature had contemplated to extend their power to cases coming under section 215, they would have said so explicitly.

(1) I. L. R. 2 Calc. 405. (2) I. L. R. 1 Calc. 282. (3) I. L. 2 Calc. 405.
(4) 14 Calc. W. R. 65 Cr. Rul. (5) 20 Calc. W. R. 46 Cr. Rul.

Revival of a case, in the absence of fresh evidence, amounts to an appeal from one Magistrate to another of co-ordinate jurisdiction, which this Code of Criminal Procedure nowhere allows. Section 297 gives to the High Court ample powers to deal with perverse verdicts by Subordinate Magistrates; but with regard to Courts other than the High Court this section is also restrictive, for, by expressly mentioning certain sections, it excludes all the others.

The judgment of the Court was delivered by

MELVILL, J.:—In this case Gowdápá bin Venkugowdá was accused before a First Class Magistrate, Mr. Rámchandra Bápuji, of an offence triable by the Magistrate, and was discharged by him under section 215 of the Criminal Procedure Code. The District Magistrate thereupon called for the record of the case; and, not being satisfied with the reasons given for the order of discharge, sent the record to another First Class Magistrate, Mr. Campbell, with an order directing him to try the case afresh. Mr. Campbell convicted the accused; but, on appeal to the Sessions Court, the conviction was reversed, on the ground that it was not competent to the District Magistrate to revive the proceedings after Gowdápá had been discharged by Mr. Rámchandra Bápuji. In support of this conclusion the Sessions Judge relied on the decision of the Calcutta High Court in the case of *Mohesh Mistree and another*.(1)

The District Magistrate professes to have acted under section 142 of the Criminal Procedure Code, and he referred the case to Mr. Campbell under section 44.

Although the terms of section 142 are very wide, yet, looking to the position of that section in chapter XI, which is headed "Of complaints to a Magistrate," we think that, in enacting that section, all that the Legislature was at the moment intending was to draw a distinction between different classes of Magistrates, and to declare that, while Magistrates generally are not competent to try a case without complaint, certain Magistrates are empowered, without any complaint and on mere suspicion, to take cognizance of offences. Whatever may be the effect of the words, we do not think it was the intention of the section to give to the

(1) I. L. R. 1 Calc 282.

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District Magistrate any power of interference with, or revision of, the decision of the Subordinate Magistrate. which is not conferred upon him by other portions of the Code. We do not think, therefore, that we should be justified in holding that the District Magistrates derive any such power of interference of revision from the very extensive words of section 142, if it appears from other portions of the Code that it was intended to restrict his powers in that respect.

Now, section 296 expressly empowers the Magistrate of the District to interfere in cases of discharge by a Subordinate Magistrate in Sessions cases only. In such cases the Magistrate of the Disrrict may order a committal to the Sessions Court, or in certain cases may order the Magistrate, who has discharged the accused, to make a new inquiry. According to the ordinary rules of construction, the conclusion from this express provision is that in cases other than those specified in section 296, the Magistrate of the District cannot order a fresh inquiry when there has been a discharge by a Subordinate Magistrate. It would be to render section 296 meaningless and useless if we were to hold that the District Magistrate could, by means of the fiction of taking up a case "upon suspicion," exercise the same power in all cases which is expressly given to him in a certain class of cases only.

It is not necessary for us to say whether there might not be circumstances under which the Magistrate of the District might take up a case under section 142, after a discharge by a Subordinate Magistrate. It is sufficient to say that that section cannot empower him, as he has done in this case, to call for the record of a case in which there has been a discharge by a Subordinate Magistrate, and merely on the ground that he differs from the conclusion arrived at by the Subordinate Magistrate on the evidence, to direct another Subordinate Magistrate to make a fresh inquiry into the case. An accused person might, if this were permitted, be harassed beyond all measure. The Magistrate of a District, if not satisfied with the order of discharge passed by one Subordinate Magistrate, might refer the case for fresh inquiry to every one of his subordinates in succession; and, if each inquiry resulted in the discharge of the accused, the District Magistrate might, as a last resource, proceed to try the case himself.

The Magistrate of the District in this case professes to have called for the record under section 142. That section gives no power to call for proceedings. The only section which gives that power is section 295, and under that section the District Magistrate must be held to have acted. And we agree with the decision of the Calcutta Court in *Mohesh Mistree's* case,(1) to the effect that if a case come before the Magistrate under section 295, the proper and only course for him (except in Sessions cases) is to report it for the orders of the High Court.

The pleader, who has supported this appeal on behalf of the Government, has pressed upon our consideration the argument that, if this view of the law be correct, there is no remedy in the case of a perverse discharge by a Magistrate, in the face of evidence which demanded a conviction. A perverse acquittal, he argued, might be rectified by an appeal; but an order of discharge would be practically irreversible, unless it involved some error in law. To this it is sufficient to answer that, if the Legislature had intended to give to the District Migistrate a power to order a fresh trial in all cases of discharge, it would not have expressly conferred that power in Sessions cases only; and that the powers given to the High Court by section 297 are probably sufficiently extensive to enable this Court to deal with every case in which an order of discharge could properly be regarded as perverse.

For these reasons we think that the order of the Sessions Court, reversing the conviction of Gowdápá, was a right order, and we accordingly reject the appeal made by the Government of Bombay.

Appeal rejected.

(1) I. L. R. 1 Calc. 282.

APPELLATE CIVIL.

Before Mr. Justice Melvill and Mr. Justice Kemball.

1878. March 5.

BASAPPA BIN MALAPPA AKI (ORIGINAL DEFENDANT No. 2), APPELLANT, *v.* DUNDAYA BIN SHIVLINGAYA (ORIGINAL PLAINTIFF), RESPONDENT.*

Court's sale under a decree reversed in appeal before confirmation.

Plaintiff's title to certain land in dispute was derived from the purchaser at a Court's sale, under a decree which was reversed in appeal subsequently to the sale, but before it had been confirmed.

Held that the Court which had made the decree ceased from the moment of the reversal, to have jurisdiction to take any further steps to execute the decree. Though the Court, when it confirmed the sale, was probably not informed that its decree had been reversed, and the purchaser was probably ignorant of it, yet the act of the Court in completing the sale was none the less without jurisdiction: and, being without jurisdiction, could confer no title.

If a decree be reversed after a sale under it has become absolute, and a certificate has been granted to the purchaser, the title of the purchaser is not affected by the reversal of the decree.

A purchaser is bound to satisfy himself as to the jurisdiction of a Court to order a sale, and this obligation continues until the sale is completed. Before he applies to the Court to confirm the sale and grant him a certificate, the purchaser ought to ascertain that the decree, under which the sale was ordered, is still in existence.

THIS was a second appeal from the decision of C. H. Shaw, District Judge of Belgaum, affirming the decree of A. M. Cantem, First Class Subordinate Judge at the same place.

Ghanasham Nilkanth Nádkarni for the appellant.

Pándurang Balibhadra for the respondent.

MELVILL, J.:—This is a suit in ejectment, and, although the appellant, who was a defendant, may have no title, the plaintiff (the respondent) must recover on the strength of his own title. The plaintiff's title to the land is derived from the purchaser at a Court sale. The decree under which the sale took place was reversed in appeal. The reversal took place subsequently to the sale, but before the order was made confirming the sale. It is well established that, if a decree be reversed after a sale under it

*Second Appeal No. 315 of 1877.

has become absolute, and a certificate has been granted to the purchaser, the title of the purchaser is not affected by the reversal of the decree. But, in the present case, the decree was reversed while the sale was still incomplete; and from that moment the Court, which had made the decree, ceased to have jurisdiction to take any further steps to execute it. The Court, when it confirmed the sale, was probably not informed that its decree had been reversed, and the purchaser was probably ignorant of it. But the act of the Court, in completing the sale, was none the less without jurisdiction; and, being without jurisdiction, could confer no title. We may refer on this point to the observations of the Judicial Committee in *Syed Tuffazal Hossein Khán* v. *Raghunáth Prasád.*[1] In that case a Court had sold a mere expectancy or claim, which was not of such a nature as to be subject to attachment and sale. Their Lordships say: "The real objection to this sale, if sustainable in law, is not one of irregularity; it is one which, from its nature, as founded on a want of power in the Court, affects equally, if it be valid in law, the title of a purchaser under a strictly regular sale. Assuming the decision under appeal to be correct, the sale would be simply inoperative, though uncancelled." In the present case, the want of jurisdiction in the Court arose from a different cause; but the principle applicable appears to us to be the same. A purchaser is bound to satisfy himself as to the jurisdiction of a Court to order a sale (*Calvert* v. *Godfrey*),[2] and this obligation continues until the sale is completed. Before he applies to the Court to confirm the sale and grant him a certificate, the purchaser ought to ascertain that the decree under which the sale was ordered is still in existence.

For these reasons, we think that the plaintiff took nothing by his purchase; and we therefore reverse the decrees of the Courts below, and disallow the claim. As, however, it has been found that the appellant has set up a false case, we direct that he bear his own costs throughout. The plaintiff (respondent) must also bear his own costs in all Courts.

Decree reversed.

(1) 7 Beng. L. R. (P. C.) 186. (2) 6 Bea. 97.

[ORIGINAL CIVIL.]

Before Sir M. R, Westropp, Kt., Chief Justice, and Mr. Justice Green.

1878. January 18.

BHAVAN MULJI (PLAINTIFF) *v.* KAVASJI JEHANGIR JASAWALA AND PEROSHA MERWANJI, LIQUIDATORS OF THE AMRAOTI MILL COMPANY (DEFENDANTS).*

Order and disposition—True owner—Indian Insolvent Act (11th and 12th Vic., Cap. 21, Sec. 23)—Constructive trustee.

N, an original allottee of five shares in the A Company, assigned them to B. No transfer was executed, and notice of the assignment was given to the company, which subsequently went into liquidation. N became insolvent. B sued the liquidators of the company for the amount due in respect of the five shares on the first distribution of assets.

Held that at the time of N's insolvency the plaintiff was the true owner of the shares within the meaning of section 23 of the Indian Insolvent Act (11 and 12 Vic.), and that as he had omitted to give notice to the company of the assignment to him, and as he had procured no transfer to be executed in his favour which the company, under their articles of association, were bound to recognize, he had consented that the shares should remain in the order and disposition of N, and, consequently, the shares and the right to receive any distribution of assets in respect of them vested, upon N's insolvency, in the Official Assignee.

Semble—The principle that a person who is under an obligation to convey property to another is, in a Court of Equity, a trustee of such property for the latter, does not apply in cases where the reputed ownership clause of the Insolvent Act is in question.

Ex parte Littledale (1) *and In re Sketchley* (2) followed.

THIS was a case stated for the opinion of the High Court, under section 7 of Act XXVI. of 1864, by J. O'Leary, First Judge of the Court of Small Causes at Bombay.

The plaintiff sued to recover from the defendants the sum of Rs. 1,000, being the amount of the first distribution of assets in the Amraoti Mills Company, at the rate of Rs. 200 per share, in respect of five shares in the said company held by the plaintiff.

One Nágardás Parmanandás had been the original allottee of these shares, for which, however, no certificate had been issued. The only document which he had obtained, showing his right to the shares, was a receipt signed by the secretaries and treasurer of the company for the amount of the first call.

* Small Cause Court Reference, Suit No. 15753 of 1876.

(1) 6 DeG., M. & G. 714. (2) 1 DeG. & J. 163.

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In November 1874, Nágardás Parmanandás assigned the shares in question to the plaintiff, and handed over to him the above-mentioned receipt. No transfer was ever executed, and no notice of the assignment was given to the company. By the articles of association the company was not bound to recognize any interest in a share other than that of a registered shareholder. Subsequently to the assignment to the plaintiff, Nágardás became insolvent, and in October 1875 the Amraoti Mills Company went into liquidation.

The First Judge of the Small Cause Court found for the defendants on the ground that the right of Nágardás Parmanandás to the shares was only a chose in action; and as no notice of the assignment to the plaintiff had been given, the shares remained in the order and disposition of the insolvent Nágardás Parmanandás at the date of his insolvency, and thereupon passed to his assignee.

On behalf of the plaintiff the opinion of the High Court was required on the following questions:—

1. Whether plaintiff was the owner of the five shares in question within the meaning of the 23rd section of the Indian Insolvent Act (11 and 12 Vic., cap. 21)?

2. Whether, supposing plaintiff was the true owner as aforesaid, the said shares were in the order and disposition of said Nágardás Parmanandás at the time of his insolvency?

Inverarity for plaintiff.

Mayhew for defendants.

The judgment of the Court was delivered by

GREEN, J.:—The action in this case was for the recovery of the sum of Rs. 1,000, being the amount of the first distribution of assets in the above-mentioned company (in liquidation), at the rate of Rs. 200 per share, in respect of five shares in the company held by the plaintiff.

The facts appearing from the case, stated by the Judge, were as follows:—

That five shares in the company were allotted to one Nágardás Parmanandás before the 30th November 1874; that no share certificates were ever issued; that the only document which Nágardás

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ever obtained, as evidencing his right to the five shares, was a receipt for Rs. 1,250, the first call on five shares in the company, which receipt was signed by the then secretaries and treasurer of the company. The receipt was in the following form:—

"Received from Nágardás Parmanandás, Esq., the sum of rupees one thousand two hundred and fifty, being the amount of first call on five shares of Amraoti Cotton Mills, as per allotment No. 132.

Bombay, 27*th October* 1874.

(Signed) VOLKART BROTHERS."

It was further found by the Judge that, on or about the 30th November 1874, Nágardás, by a certain document (a copy of which is annexed to the case) of that date and for valuable consideration, purported to assign his right in the said shares to the plaintiff.

This document, signed by Nágardás, and stamped, was in the following form:—

"To M. Bhowanji Mulji written by Nágardás Parmanandás. To wit. I have this day sold to you five shares, namely, five shares of the Amraoti Cotton Mills Company, Limited, on receiving Rs. 750, namely, seven hundred and fifty, in cash, at the rate of Rs. 150, namely, one hundred and fifty, per 1 share. I have given in writing (this) receipt of the first call in respect of these above-mentioned shares, and if any one makes any objection in respect of these shares, I am duly to make answer to you, and if any profit or loss ensued regarding these shares, all (that) is on your head, and you are duly to pay the calls in respect of these shares, which may have to be paid hereafter."

It is found, further, that no notice of this assignment was given to the company; that the company went into liquidation in October 1875; that there were surplus assets distributed among the shareholders; and that Nágardás had become insolvent, and his property had passed to the Official Assignee under the Indian Insolvent Act. The date at which he filed his petition for the benefit of the Act is not stated in the case.

The action, it appears, was for the amount of assets alleged to be payable to the plaintiff in respect of the said five shares, of which he claimed to have become and to be the holder.

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The Judge at the hearing passed a verdict for the defendants on the ground, chiefly, that the right of Nágardás Parmanandás to the shares in question was only a chose in action; and as no notice of the assignment had been given, the shares remained in the order and disposition of the insolvent Nágardás at the date of his insolvency, and, therefore, passed to his assignee. Such verdict was, however, upon the request of the plaintiff's attorney for the statement of a case for the opinion of the High Court, made subject to the opinion of the High Court on the following questions :—

1. Whether plaintiff was the true owner of the five shares in question within the meaning of the 23rd section of the Indian Insolvent Act?

2. Whether, supposing plaintiff was the true owner as aforesaid, the said shares were in the order and disposition of the said Nágardás Parmanandás at the time of his insolvency?

The words of section 23 of the Indian Insolvent Act (11 and 12 Vic., cap. 21) on which the present question arises are as follows—"If any insolvent shall, at the time of filing his petition, &c., by the consent and permission of the true owner thereof, have in his possession, order, or disposition any goods or chattels whereof such insolvent is reputed owner, or whereof he has taken upon him the sale, alteration, or disposition as owner, the same shall be deemed to be the property of such insolvent so as to become vested in the Official Assignee, &c."

It was argued on behalf of the plaintiff that the operation of the section of the Insolvent Act, above cited, was excluded by the fact that the bankrupt Nágardás was a trustee of the five shares for the plaintiff, and that the case was governed by *Re Bankhead's Trust.*(1) It was there held that the bankrupt had constituted himself a trustee of certain policies of insurance (retained, however, in his own possession) for the purpose of answering certain appropriations to his own use of trust funds in his hands. It was held that the bankrupt being trustee of the policies for the purpose aforesaid, was the proper person to be in possession of them, and was, in fact, himself the real owner of them within the meaning of the provision of the English Bankrupt Law as to reputed ownership by a bankrupt of

(1) 2 K. & J. 560.

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goods and chattels; and that the provision in question applied only where the bankrupt and the real owner were distinct persons. That authority does not, however, we think, apply to the present case for the reason that we do not consider that the insolvent Nágardás for the purposes, at least, of this case, was in any proper sense of the word a trustee of the shares in question here. The instrument of assignment of the 30th November 1874 does not purport to be a declaration of any trust. It is, no doubt, as an instrument of assignment, ineffectual to transfer the shares, having regard to clauses 16 to 22 of the articles of association of the company (which were put in evidence at the hearing before us), though it would, we consider, have had effect given to it as an agreement to transfer had the plaintiff brought a suit against Nágardás to have a regular transfer executed, which would be in conformity to the articles of association of the company. Though, no doubt, in a certain sense one who is under an obligation to convey property to another is, in a Court of Equity, a trustee of it for the latter, yet this principle has not, it seems, been applied in cases where the reputed ownership clause of the Bankrupt Act is in question, as may be seen from the cases of *Ex parte Littledale*, (1) and *Re Sketchley*.(2) A number of authorities were cited in the argument which had more or less bearing on the questions under consideration. But we consider that the two cases we have just mentioned are more distinctly in point. From a consideration of these authorities we are of opinion that, at the time of the insolvency of Nágardás, the plaintiff was the real owner of the shares in question within the meaning of section 23 of the Indian Insolvent Act, and that inasmuch as he had omitted to give to the company any notice of the assignment to him, and had, in fact, no transfer or assignment at all executed in his own favour which the company, under their articles, were bound to act upon or in any way to recognize, he, the plaintiff, had consented that the shares in question should be in the "order or disposition" of the insolvent. There was nothing done, in our opinion, which would have prevented Nágardás from executing a formal transfer of the shares, in conformity with the articles of association, to another person, which transfer the company would have been bound to recognize

(1) 6 DeG., M. & G. 714. (2) 1 DeG. & J. 163.

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This being so, we are of opinion that the shares, with the consequent right to receive any distribution of assets in respect of them, vested in the Official Assignee of Nágardás.

The questions, therefore, referred for the opinion of this Court must be answered in the affirmative, and judgment will be entered for the defendants. The plaintiff must pay the defendants' costs of reserving the said questions, and stating the same for the opinion of this Court, and the costs incidental thereto.

Attorneys for the plaintiff :—*Messrs. Jefferson and Payne.*

Attorneys for the defendants :—*Messrs. Ardasir and Hormasjee.*

[APPELLATE CIVIL.]

Before Mr. Justice Melvill and Mr. Justice Kemball.

March 5.

UMEDMAL MOTIRÁM (ORIGINAL PLAINTIFF), APPELLANT, *v.* DAVU BIN DHONDIBÁ (ORIGINAL DEFENDANT), RESPONDENT.*

Incomplete contract—Act IX of 1872, Section 39—Registration—Evidence—Act I of 1872, Section 92, Proviso (4)—Oral agreement to rescind a registered contract.

D sold a house to P, and executed a deed of conveyance, which was duly registered. The purchase-money, however, was never paid by P, who, consequently, never obtained possession. Shortly after the conveyance had been registered, P returned it to D, with an endorsement thereon to the effect that it was returned because P was unable to pay the purchase-money. The right, title, and interest of P in the house was subsequently attached and sold under a decree obtained against him by the plaintiff. The plaintiff became the purchaser, and sued D for possession. The lower Courts threw out the claim, on the ground that the property had not passed to P, the sale to him being incomplete.

Held—

(1). The sale of the house by D to P was not incomplete. The deed purported to make an immediate transfer of the ownership of the house to P, and P accordingly became the owner of the house.

(2). The endorsement on the conveyance, not having been registered, could not affect the property.

(3). The conveyance by D to P having been registered, no oral agreement to rescind it could be proved under the Indian Evidence Act (I. of 1872), section 92, proviso (4).

(4). The plaintiff, therefore, as purchaser of the right, title, and interest of P, became legal owner of the house, but subject to all P's liabilities ; and as D had a lien upon the house for the amount of the unpaid purchase money, the plaintiff could not obtain possession without paying off this charge.

* Second Appeal No. 818 of 1877.

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THIS was a second appeal from the decision of W. H. Newnham, Acting District Judge of Puna, affirming the decree of L. G. Fernandez, Second Class Subordinate Judge at the same place.

Pándurang Balibhadra for the appellant.

Ghanasham Nilkanth Nádkarni for the respondent.

The facts of the case are fully stated in the following judgment delivered by

MELVILL, J. :—The plaintiff is the purchaser, at a Court sale, of the right, title, and interest of one Pema in a house.

The house originally belonged to the defendant Davu, who executed the conveyance (exhibit 13) in favour of Pema. This instrument was deliverd to, and duly registered by, Pema. Although it is distinctly stated in it that the purchase-money had been paid and the house delivered to Pema, it has been found by the Courts below that the consideration was, in fact, not paid, nor the property delivered ; but that, on the contrary, Pema, being unable to raise the purchase-money, returned the deed to Davu eleven days after it had been registered, and that thus (in the opinion of those Courts) the whole transaction of sale fell to the ground.

All this took place before the attachment and sale of the house; and the question is, whether Pema, under the above circumstances, had any interest in the house at the date of the sale, or whether the property in the house remained in the defendant Davu. The Courts below have treated the transaction as an incomplete contract ; and we are asked to deal with it under section 39 of the Contract Act, which provides that, when a party to a contract has refused to perform his promise, the promisee may put an end to the contract. It is argued that Davu put an end to the contract, because Pema refused to pay the purchase-money. But we think that the transaction cannot be so regarded. This was not a case of contract based on mutual promises. The deed of conveyance (exhibit 13) purports to make an immediate transfer of the ownership of the house in consideration of value already received. It is not an agreement to convey, but a conveyance ; and it is not open to the party who executed it to show that it was intended to be something quite different.

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When exhibit 13 had been executed, delivered, and duly registered, it operated as a conveyance, and Pema became the owner of the house. It is not pretended that he ever re-conveyed the house to Davu. What is alleged would, if proved, amount to an agreement to rescind the purchase; but the evidence offered to establish such agreement is not admissible. The endorsement made on exhibit 13, when it was returned by Pema, cannot affect the property, because it is not registered; and as exhibit 13 has been registered, no oral agreement to rescind it can be proved (Indian Evidence Act, section 92, proviso (4)).

It follows that the plaintiff, as the purchaser of Pema's right, title, and interest, is the legal owner of the house. But he has acquired Pema's title subject to all Pema's liabilities. Even if the purchaser at a Court sale can be regarded as a purchaser for value without notice, the plaintiff cannot avail himself of that plea, since the defendant, and not Pema, was in possession at the date of the purchase. The defendant has a lien upon the house for the amount of the unpaid purchase-money; and the plaintiff cannot, any more than could Pema, obtain possession of the house without paying off this charge.

We reverse the decrees of the Courts below, and order that, if within six months from this date the plaintiff do pay to the defendant the sum of Rs. (162) one hundred and sixty-two, the house mentioned in the plaint be delivered by the defendant to the plaintiff; but that, in default of such payment, the plaintiff do forfeit his right to recover the said house. Each party will bear his own costs throughout.

Decree reversed.

[ORIGINAL CIVIL.]

Before Sir M. R. Westropp, Kt., Chief Justice, and Sir Charles Sargent, Kt., Justice.

1878. March 15.

HAJEE ESMAIL HAJEE SIDICK AND ANOTHER (ORIGINAL PLAINTIFFS) ... ... } APPELLANTS

v.

SHAMJI POONJANI (ORIGINAL DEFENDANT) ... RESPONDENT.*

Marine insurance—Policy, Construction of.

In a policy of insurance effected in Bombay upon goods shipped from Calcutta to Jeddah, two clauses were inserted in writing, the rest of the policy being in the ordinary English printed form. The first written clause was in English as follows:—"Warranted free of particular average, unless stranded, sunk, or burnt." The second was written on the margin of the policy in the Gujaráthi language, and was to the following effect:—"Insurance upon the goods to be without damage. The loss arising from damage is to be on the head of the owner of the goods."

Held—The underwriters of such a policy are liable to the insurer for a particular average loss where the vessel, in which the insured goods are shipped, is stranded, sunk, or burnt.

THIS was an action against the defendant as underwriter for the sum of Rs. 1,920 of a policy of insurance upon 680 bags of rice shipped by the plaintiffs from Calcutta to Jeddah. The ship *Hydree*, in which the goods, together with other cargo, were conveyed, was wrecked on the 8th February 1876 upon a rock five or six miles off the port of Jeddah. Part of the cargo on board was saved, and duly delivered to the consignees, uninjured. The remainder, some portion of which was still under water on the wreck, was sold, more or less damaged, and the proceeds divided rateably among the persons interested. The sum allotted to the plaintiffs in respect of the 680 bags of rice was Rs. 308. For this sum the plaintiffs gave credit to the defendant, and sued to recover the balance of the amount for which the defendant had insured, viz., Rs. 1,612.

The policy, which was dated the 5th January 1876, was in the ordinary English printed form. Two clauses had been inserted in writing. The first of these was written in the body of the policy, and was in the English language as follows:—"Warranted free of particular average, unless stranded, sunk, or burnt." The second was written on the margin of the policy, and was in Gujaráthi to the following effect:—"Insurance upon the goods

* Suit No. 568 of 1876.

to be without damage. The loss arising from damage is to be on the head of the owner of the goods." A memorandum of agreement, or *kachcha* policy, had been previously executed by the plaintiffs and defendant in which it was provided that "this insurance is agreed to be according to the rules of an English policy without damage."

The defendant contended that the plaintiffs had suffered merely a partial loss, and that the effect of the Gujaráthi clause was to exempt insurers from all liability except for total loss.

The action was tried by Mr. Justice Atkinson, who passed a decree for the defendant.

The plaintiffs appealed.

Kirkpatrick and *Inverarity* for the appellants.

B. Tyabji and *Lang* for the respondents.

WESTROPP, C.J. :—We are of opinion that no total loss of the plaintiffs' goods has been shown ; but that to recover in this action it is sufficient, inasmuch as the ship was lost by being stranded upon a rock, to establish a particular average loss. Whether we look to the oral evidence as to the commercial meaning attached in Bombay to the Gujaráthi words importing "without damage," or to the true construction of the policy itself without the aid of such evidence, we must hold the defendant (respondent) to be responsible for a particular average loss. Except the testimony of the respondent himself (who was strongly biassed by his interest), and that of his one witness who—Mr. Justice Atkinson, it was admitted, said—was wholly undeserving of credit, the evidence was all in one direction, viz., that the ship having been stranded, the underwriters were, under such a policy as that sued upon here, liable for the damage, *i.e.*, the particular average loss incurred. The plaintiffs' witnesses, of whom four were insurance brokers, two were underwriters, and two were merchants, were unanimous on that point.

Independently, however, of their evidence, and looking at the documentary evidence alone in this case, we should have come to the same conclusion. In the Gujaráthi preliminary (*kachcha*) policy (exhibit No. I) it was stated that "this insurance is agreed to be according to the rules of an English policy without damage." What those rules are in Bombay sufficiently appear in the

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HAJEE ESMAIL HAJEE SIDICK AND ANOTHER v. SHAMJI POONJÁNI.

seventeen policies put in on behalf of the plaintiffs and the two policies, marked No. 2, put in on behalf of the defendant. All of those policies contain in the body or in the memorandum the usual English clause—"free from particular average, unless stranded, sunk, or burnt;" and in the margin the Gujaráthi clause to the effect that "this policy is without damage." The eight policies, marked No. 1, and put in on behalf of defendant, contain neither of these clauses. Hence it would seem that, according to the custom of Bombay, amongst native merchants and native underwriters, when either of these clauses appear in a policy, the other does so also. They are (so far as we can form an opinion from the documentary evidence before us) apparently invariably found together. The English clause occurs first in point of order. It is, however, unnecessary to resort to the rule as to deeds or contracts, that where clauses are inconsistent with each other, the first in order must prevail. There is no such irreconcileability here. Effect will be given to the Gujaráthi provision, that the policy sued upon is "without damage," by construing it to mean that the underwriters shall not be liable for damage, unless the ship be stranded, sunk, or burnt, and this construction gives full effect to the English provision, also contained in the policy, that the underwriters are to be free from liability for particular average, unless the ship be stranded, sunk, or burnt. Were we to give unlimited scope to the Gujaráthi stipulation, that the policy is to be "without damage," we should reject altogether from the English clause the excepting words "unless stranded, sunk, or burnt." These specific words control, but do not nullify, the principal words "without damage" in the Gujaráthi stipulation, and it is our duty so to construe the policy as to give effect, so far as is practicable, to all the provisions in the policy without wholly rejecting any of them. We decline to countenance for a single moment the argument that the underwriters, who have been subscribing such policies for many years, do not understand the meaning of the English clause.

Decree reversed.

Attorneys for the appellants :—*Messrs. Jefferson and Payne.*

Attorneys for the defendant :—*Messrs. Tyabji and Sayani.*

[APPELLATE CIVIL.]

Before Mr. Justice Melvill and Mr. Justice Kemball.

DALPATBHAI BHAGUBHAI (PLAINTIFF), APPLICANT, *v.* AMARSANG KHEMABHAI AND ANOTHER (DEFENDANTS), OPPONENTS.*

1878. March 20.

The Code of Civil Procedure (Act X. of 1877), Sections 2, 244, 540, and 588—Appeal—Execution of a decree—Judicial proceeding.

There is no appeal against an order made under section 244 of the Code of Civil Procedure (Act X. of 1877) determining questions between the parties to a suit as to the amount of mesne profits recovered by the plaintiff subsequently to the decree and as to the amount payable on account of the costs of execution of that decree.

The term "judicial proceeding," as used in section 2 of the Code of Civil Procedure (Act X. of 1877), must be understood to mean a judicial proceeding of the same nature as a suit or such proceedings as are referred to in sections 333, 522, 526, and 531 of the Code. The definition given in the Code of Criminal Procedure (Act X. of 1872) is not applicable.

THIS was an appeal from an order passed by Ráo Báhádur Chintáman Sakhárám Chitnis, Subordinate Judge, First Class, at Kheda, in the district of Ahmedabad, in the matter of the execution of decree No. 976 of 1876 on the file of the Court.

The facts of the case are as follows:—

On the 26th of June 1876 the applicant Dalpatbhái Bhagubhái obtained in the Court of the Subordinate Judge, First Class, at Kheda, a decree against 15 persons (the present opponents and others). That decree directed that the plaintiff, the said applicant, should recover from the defendents personally, as well as from the lands mortgaged by them to the plaintiff, Rs. 7,900 and the costs of the suit. On the 1st of August 1876, the plaintiff made an application for the execution of this decree, and got the lands sold; but the sale was set aside on the ground of irregularities, and an order for a re-sale was made. On the 24th March following, this application was allowed to be withdrawn, at the instance of the plaintiff, who was permitted to make a fresh application.

The plaintiff, thereupon, on the 26th of April 1877, made the present application, in which, besides asking for the principal sum decreed with interest, he prayed that Rs. 110, being the costs of his first application, and Rs. 300, interest on the principal sum up to the date of his second application, should be given to him by

* Appeal No. 2 of 1878 from an order.

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attachment and sale of the mortgaged lands and for the imprisonment of four of the judgment-debtors, two of whom opposed this application.

On the 15th of June 1877, the opponents deposited in Court Rs. 8,936, the full amount demanded by the plaintiff, under protest, and objected that the present application was unnecessary and malicious, and that they should not be saddled with the cost of the first application, and they also claimed a deduction of the amount of profit received by the plaintiff, who had already been put into possession of the mortgaged lands.

The Subordinate Judge allowed both these objections, and directed that, out of the sum deposited, Rs. 460 should be deducted, and the balance of Rs. 8,476 paid to the plaintiff in full satisfaction of his decree. This order was made on the 8th of October 1877, that is, a week after the new Civil Procedure Code (Act X. of 1877) came into operation.

On the 14th of January following, the plaintiff appealed to the High Court, and a notice was issued to the opponents, subject to any objections which might be taken by them, at the hearing as to the admissibility of an appeal, under section 588 of Act X. of 1877, against an order of this kind.

Pándurang Balibhadra for the opponents:—The order objected to involves a question arising between the parties to the suit in which the decree was passed, and relates to the execution of that decree. It, therefore, falls within section 244 of the Code. Clause (*j*) of section 588, which allows appeals from orders as distinguished from decrees, enacts an important condition to the admissibility of an appeal from orders, under section 244, viz., that the orders objected to must be of the same nature with appealable orders made in the course of a suit What these appealable orders are should be gathered from the other clauses of section 588, which does not refer to orders made upon a determination of the merits of the execution proceedings as in this case.

Nagindás Tulsidás and *Goculdás Káhándás* for the applicant:—The order we object to is in the nature of a decree, which is explained in section 2 of the Code to mean a formal order of the Court in which the result of the decision of a suit or other judicial

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proceeding is embodied. We submit that the proceeding by the Subordinate Judge was clearly a judicial proceeding, the essential characteristics of which are the capability of receiving evidence and passing a judgment upon it. Section 540 gives an appeal from decrees which should be allowed in this case; for otherwise the result would be to exclude appeals from important orders, and allow them from comparatively unimportant ones.

Pándurang Balibhadra in reply:—Where the Legislature has expressed its intention unmistakeably, as in this matter, it is not for the Court to reconcile inconsistent enactments. Every order embodying the result of a judicial proceeding cannot be a decree. If that were so, the Legislature need not have taken the trouble to enact section 588 at all, and specify in detail the various appealable orders. Section 540 would have been quite sufficient to carry out their object.

Cur. adv. vult.

The judgment of the Court was delivered by

MELVILL, J. :—This is an application of appeal against an order of the First Class Subordinate Judge of Kheda made subsequently to the date on which the new Code of Civil Procedure came into force, by which the Subordinate Judge determined two questions arising between the parties to a suit, viz., first, the amount of mesne profits which the plaintiff had recovered from certain mortgaged property subsequently to decree, and secondly, the amount payable on account of the costs of execution. The final order of the Subordinate Judge was that, out of a sum of money deposited by the defendant, Rs. 8,476 should be paid to the plaintiff in full satisfaction of his decree, and the balance restored to the defendant.

Against this order the plaintiff wishes to appeal, and the appeal was admitted provisionally, subject to any objection which the defendant might take to its admissibility under the provisions of the new Code.

After hearing arguments on both sides we have come to the conclusion that no appeal lies in this matter. The Subordinate Judge's order is an order, under section 244, as to questions relating to execution of a decree, and, therefore, under section 588

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clause (*j*), is appealable, if it be of the same nature with appealable orders made in the course of a suit. The "appealable orders made in the course of a suit" must be taken to be the orders mentioned in other clauses of section 588 as appealable. They are generally interlocutory orders, not going into the merits of any question arising in the suit. The present order is not of such a nature, and, therefore, no right of appeal can be derived from the provisions of section 588.

But it has been argued that under section 540 an appeal lies from all decrees, and that the definition of the term "decree" in section 2 of the Code is sufficiently wide to include the order of the Subordinate Judge in this case. That definition is as follows:—

"Decree" means the formal order of the Court in which the result of the decision of the suit or other judicial proceeding is embodied.

The term "judicial proceeding" is not defined, and it is, no doubt, susceptible of very wide extension. If the definition contained in the Code of Criminal Procedure were adopted, it would mean "any proceeding in the course of which evidence is or may be taken, or in which any judgment, sentence, or final order is passed on recorded evidence." Under such a definition most orders made by a civil Court, including many of those specified in section 588, would be decrees, and appealable as such, and, therefore, if such a definition had been intended, no such orders would have been mentioned in section 588, which forms part of a chapter which was evidently intended to deal with orders which are not decrees. We think that, in the definition of the term "decree," the expression "suit or other judicial proceeding" must, according to a common rule of construction, be understood as meaning a suit or other judicial proceeding of the same nature as a suit. Moreover, the definition limits the term "decree" to a "formal order in which the result of the decision is embodied;" and this indicates that it applies only to those orders which the law requires to be drawn up after a decision has been recorded in a particular formal manner, *i.e.*, to those orders, or their like, which are described as decrees, and of which the form is given in section 206 of the Code. The law requires that such

formal orders shall be drawn up, not only in ordinary suits but also in certain other proceedings which are not instituted as suits, and are not, strictly speaking, suits, though they are numbered and registered as if they were suits, and are investigated in the same manner and with the like power as if they were suits. Such are proceedings in reference to resistance to execution; in regard to which the Code prescribes (section 333) that the order passed shall be in the nature of and shall have the same force as a "decree in a suit." Similarly, in the case of agreements to refer to arbitration otherwise than in a suit, in the case of references to arbitration without the intervention of a Court (chapter XXXVII), and in the case of proceedings on agreement of parties (chapter XXXVIII), the proceedings are not strictly speaking suits; but the law requires that a decree shall be made "in the same way as in an ordinary suit" (sections 522, 526, 531). These may be the "other judicial proceedings" to which the Code refers in the definition of "decree"; although as such proceedings are to be numbered and registered as suits, the insertion of the words "other judicial proceedings" was perhaps hardly necessary, as the word "suit" would have included these. But, however this may be, we feel compelled to the conclusion that orders made in execution of the nature of that now under consideration cannot be included in those formal orders in which the decision of the suit or other judicial proceeding is embodied, to which reference is made in the definition of the term "decree."

It may appear that we have entered at unnecessary length into our reasons for refusing to put an obviously forced construction upon a term which has such a well-established meaning as the word "decree." The truth is, that we have been unwilling to reject that construction, except on the strongest ground of necessity, because it affords the only possible means of holding that the Legislature did not intend to deprive parties of the right to appeal against the orders ordinarily made in regard to the execution of decrees. Such orders are of the highest importance, quite as important, in many instances, as the decree itself. A Subordinate Judge may, for example, decide that an application for execution is barred by lapse of time. His reasons may be quite erroneous; yet the decree-holder cannot appeal, and he is

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thus deprived of the whole fruits of his litigation. But such seems to have been the deliberate intention of the Legislature. In the draft Bill published in the *Gazette of India* of the 14th October 1876, section 588 gave a right of appeal against *all* orders under section 244 as to questions relating to the execution of decrees, and the Select Committee reported (page 1209) that this provision had been advisedly introduced. The words of limitation, viz., "of the same nature with appealable orders made in the course of a suit," were subsequently inserted, and apparently without any republication of the section in its altered form. In the draft Bill referred to this Court for its opinion the words above quoted found no place. Considering the great importance of these words, and the havoc which they make of previously existing rights of appeal, we cannot help thinking that, if an opportunity of discussing them had been afforded to the public and the Courts, such arguments might have been advanced as would have induced the Legislature to reconsider them. As it is, we have no choice but to give effect to the declared intention of the Legislature; and we accordingly dismiss this appeal with costs.

Appeal dismissed.

[APPELLATE CIVIL.]

Before Mr. Justice Melvill and Mr. Justice Kemball.

March 26.

NURSINGDÁS RUGUNATHDÁS (PLAINTIFF) *v.* TULSIRÁM BIN DOULATRÁM (DEFENDANT).*

Code of Civil Procedure (Act X. of 1877), Section 268—Attachment and sale of bonds—Courts of Small Causes.

Under the provisions of section 268 of the Code of Civil Procedure (Act X. of 1877) bonds cannot be sold till the end of six months from the date of attachment.

A Court of Small Causes cannot appoint a receiver. Bonds, therefore, on which recovery will be time-barred before the date on which a sale can legally be made, cannot be made available for satisfaction of the judgment-creditor's debt.

THIS was a reference by Madan Shrikrishnáji, Judge of the Court of Small Causes at Puna. He submitted the case with the following remarks:—

* Small Cause Court Reference No. 1 of 1878.

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"The plaintiff in the suit obtained a decree in his Court in his favour on 30th December 1877, and in execution thereof caused certain bonds for money due to the defendant by his debtors, and which were in his (plaintiff's) possession, to be attached on the 18th December 1877, under section 268 of the new Civil Procedure Code. He (plaintiff) now applies to the Court for an order to sell the said bonds, stating that some of them will be barred by the law of limitation in a short time.

"The question for decision is,—whether, under the circumstances, the attached bonds can be sold before the expiration of six months from the date of the attachment.

"My opinion is, that they cannot be so sold. Section 268 of the new Civil Procedure Act (last paragraph) provides that 'no attachment, under this section, shall remain in force for more than six months, at the end of which time, if the judgment-debtor has not obeyed the decree, the property attached may be sold, and out of the proceeds the Court may award to the decree-holder such compensation as it thinks fit, and pay the balance, if any, to the judgment-debtor on his application.' The paragraph appears to me to be loosely worded. The first part thereof simply limits the length of the time for which an attachment, under the aforesaid section, can remain in force; but the latter part provides that the Court may sell the attached property, unless the execution defendant obeys the decree within six months from the date of the attachment. If this latter provision be fulfilled by giving the defendant six months' time to obey the decree, the attachment must necessarily remain in force for more than six months; for, if the defendant satisfies the decree even on the first day of the period of six months allowed to him, the Court cannot sell the attached property, and if he does not satisfy it, the attachment must, as a matter of course, remain in force for a further period necessary to prepare and publish the proclamation issued under section 287, and also for at least 15 days more from the date on which a copy of such proclamation shall have been affixed in the Court-house. The first part would thus seem to be inconsistent with the latter; but, under the paragraph as it now stands, the Court has no power to sell the said attached bonds for six months from the date of the attachment.

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"This will, no doubt, be hard on the plaintiff; for, if the bonds be not sold before the expiration of six months, they may be barred, and nobody would purchase them, and the plaintiff may be deprived of the amount which may now be realized by the sale thereof. This difficulty would not have arisen under the old Civil Procedure Code, for this Court had power to appoint a receiver, who could sue for and recover the debt due on attached documents; but chapter XXXVI of the new Code, which provides for the appointment of receivers, is not made applicable to a Small Cause Court."

No pleader or counsel appeared on either side.

PER CURIAM:—Under the provisions of section 268, the bonds cannot be sold till the end of six months from the date of attachment.

It follows that, as a Court of Small Causes cannot appoint a receiver, any bonds on which recovery will be time-barred before the date on which a sale can legally be made, cannot be made available for satisfaction of the judgment-creditor's debt.

The Code in this respect appears to require amendment.

[APPELLATE CIVIL.]

Before Mr. Justice Melvill and Mr. Justice Kemball.

March 26.

CHUNILÁL SOBHÁRÁM (PLAINTIFF) *v.* PURBHUDÁS KURSANDÁS (DEFENDANT).*

Code of Civil Procedure (Act X. of 1877), Sections 223 and 648—Arrest—Courts of Small Causes.

Section 223 of the Code of Civil Procedure (Act X. of 1877) does not apply to Courts of Small Causes.

Section 648 of the same Act does not apply to a case in which the defendant resides within the same district in which the Court issuing a warrant is situate.

A Court of Small Causes may issue a warrant for the arrest of a person residing in another district, but not if he resides within the same district in which the Court is situate, but outside its local jurisdiction.

THIS case was referred for the opinion of the High Court by Cursetji Manekji, Judge of the Court of Small Causes at Ahmedabad.

The plaintiff Chunilál had obtained a decree against the defendant, and applied for the arrest of the defendant in execution thereof. In submitting the case the Judge made the following remarks:—

* Small Cause Court Reference No. 2 of 1878.

"The place at which the said judgement-debtor resides is *outside* the jurisdiction of this Court, but *within the district* in which this Court is situated. Section 648 of the Civil Procedure Code (X. of 1877), strictly construed, applies only to the arrests of persons outside the *district* in which the Court issuing the warrant is situate. There appears to be no other provision whereby a Court can arrest a person outside its local limits but within the *same district*. The last paragraph of section 223 (Act X. of 1877) is general; but, I submit, it is controlled and narrowed by section 648, and, moreover, it is not applicable to Courts of Small Causes. The result is a strange anomaly; for, whilst, under the said section 648, this Court could get a person arrested *outside* the district in which it is situated, yet it could not do so within the same.

"No such difficulty arose under the old Act (VIII. of 1859), and no such difficulty would have arisen now, had section 648 of the new Act contained the words 'jurisdiction of' or 'local limits of' instead of the words 'district within which.'

"The question, then, for the consideration and opinion of the High Court is,—can the application, mentioned in paragraph 2 of this letter, be granted; or, in other words, can this Court execute, or get executed, a warrant of arrest on a person residing outside its local limits, but within the district in which this Court is situated?

"However anomalous it may be, I am humbly of opinion that, on a strict construction of section 648, the above question must be answered in the negative."

No pleader or counsel appeared on either side.

PER CURIAM:—It is clear that section 648 does not apply to a case in which the defendant resides within the same district in which the Court issuing a warrant is situate.

Section 223 does not apply to Courts of Small Causes.

It follows that a Court of Small Causes may issue a warrant for the arrest of a person residing in another district, but not if he resides within the same district in which the Court is situate, but outside its local jurisdiction. This is an anomaly which appears to require the attention of the Legislature.

[APPELLATE CIVIL.]

Before Mr. Justice Melvill and Mr. Justice Kemball.

1878. April 8.

ANANDRÁV BÁPUJI (ORIGINAL PLAINTIFF), APPELLANT, *v.* SHEKH BABA AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Code of Civil Procedure (Act VIII. of 1859), Section 254—Re-sale in execution of decree—Rights of judgment-creditors.

Where property has been sold under a decree, and the purchaser at the execution-sale has made default in paying the purchase-money, the remedy of the judgment-creditor is not limited by section 254 of Act VIII. of 1859 to a suit against the defaulting purchaser. He is entitled to recover the balance of his debt from his judgment-debtor, who may, perhaps, have his remedy against the defaulting purchaser.

Joobráj Singh v. *Gour Buksh Lál* (1) dissented from.

THE facts of the case are fully stated in the judgment.

The only question argued was, whether the judgment-creditor was bound to proceed against the defaulting purchaser, and not against the judgment-debtor, for the recovery of the balance of money due on the decree.

Manekshâh Jehangirshâh appeared for the appellant.

Raghunâth Shivrâm Tipnis appeared for the respondents.

The judgment of the Court was delivered by

MELVILL, J.:—This is an application to set aside an order of the District Court of Khandesh, by which the applicant, a judgment-creditor, is debarred from proceeding further against the property of the judgment-debtors.

The applicant obtained a decree for Rs. 343-7-11 against Shekh Bábá and others, under which certain immoveable property was put up for sale. One Baksu bid Rs. 350 for the property, and made the usual deposit of 25 per cent.; but on the fifth day he failed to make good the full amount of purchase-money, and the property was, consequently, again put up for sale, and purchased for Rs. 151. The judgment-creditor made an application to the Subordinate Judge, in which he stated that Baksu had been acting in collusion with the judgment-debtors, and without any real intention of purchasing; that he was a man without means, from

* Extraordinary Jurisdiction No. 89 of 1877.

(1) 7 Calc. W. R. Civ. Rul. 110.

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whom nothing could be recovered; and he, therefore, asked that, instead of proceeding against Baksu, he might be allowed to attach other property of the judgment-debtors in satisfaction of the balance still due under his decree. This application was granted by the Subordinate Judge; but on appeal the District Judge reversed his order, on the ground that the judgment-debtors were entitled to credit for the full amount bid at the first auction-sale, that their debt was consequently extinguished, and that the judgment-creditor's only remedy was against the defaulting purchaser.

A decision of the High Court at Calcutta (*Joobráj Singh* v. *Gour Buksh Lál* (1)) certainly supports the view taken by the District Judge. In that case the Court said: "The judgment-debtor is entitled to credit for the full amount bid for the property at the time of the first sale, and if he pay up any balance due to the decree-holder in excess of the sum so bid, he must be considered as having liquidated his debt, and cannot be held responsible for any further sum. The difference between the first and second sale must be realized, not from the judgment-debtor, but, as provided by section 254, from the defaulting auction-purchaser."

But we regret that we feel unable to concur in this view. We can see no reason why a mere bid at an auction-sale should be held to have the same effect in discharging the judgment-debtor as the payment of the debt. If such were the effect, it is obvious that such fraud as is alleged in the present case would be very common. The judgment-debtor would only have to put forward a man of straw, who would bid the full amount of the debt, deposit 25 per cent., and then make default, and the judgment-debtor would thus get rid of his liability by paying 4 annas in the rupee. The judgment-creditor has nothing to do with the selection of a purchaser at an auction-sale, and we fail to see on what principle he can be compelled, when he has lent his money to a man of his own choosing, to accept as debtor in his place a person of whom he knows nothing, and who is worth nothing.

We think that the applicant in this case was not bound to proceed against the defaulting purchaser, and that he is entitled to

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recover the balance of his debt from his judgment-debtors, who may, perhaps, have their remedy against the defaulting purchaser. We, therefore, reverse the order of the District Judge, and restore that of the Subordinate Judge, with costs on the respondents throughout.

Order accordingly.

[APPELLATE CRIMNIAL.]

Before Sir M. R. Westropp, Kt., Chief Justice, Mr. Justice Melvill, and Mr. Justice Kemball.

April 29.

IMPERATRIX *v.* DONGAJI ANDAJI.*

The Code of Criminal Procedure (Act X. of 1872), *Sections* 280 *and* 297—*Death of appellant—Abatement of appeal—Revision.*

The Code of Criminal Procedure gives no right to the heir, devisee, executor, or any other representative of a deceased convict to lodge an appeal, or continue and prosecute an appeal already lodged.

(Kemball, J., diss.)—The appeal lodged by a convict abates on his death.

The High Court, nevertheless, may call for and examine the record of the case with a view to revision and rectification, and may make such order thereon as it may consider just.

THE accused Dongáji was convicted by S. H. Phillpotts, Sessions Judge of Puna, of forgery by altering a copy of a summons from the civil Court at Vadgám. On the 19th of November 1877 he was sentenced to four years' rigorous imprisonment, and to pay a fine of Rs. 1,000. On the 14th of January following, an appeal was lodged in his behalf in the High Court by his vakil. The High Court on the 30th January decided to hear the appeal, and notified to the Magistrate and Public Prosecutor of the Puna District that the appeal would be heard on or after the 14th of February 1878. On the 19th of February the Superintendent of the Puna Jail reported that the convict Dongáji had died on the morning of that day.

On the 8th April, *Máhádev Chimnáji Apte* and *Vináyak Pandit* claimed to be heard in support of the appeal.

Nánábhái Haridás (Government Pleader) objected, and urged that the appeal abated on the convict's death.

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MELVILL, J. :—The procedings in this case have been called for, with the view of hearing an appeal preferred by the convict against the finding and sentence of the Sessions Court of Puna. In the meantime the convict has died in jail.

The sentence included a fine of one thousand rupees; and as under section 70 of the Penal Code, the estate of the deceased convict is still liable for the discharge of this fine, Mr. Vináyak Pandit asks that he may be heard against the conviction.

Mr. Vináyak holds a power of attorney from the deceased convict, but this power was terminated by the death of the principal. He offers to produce a *vakalatnámá* signed by the convict's representative; but it is clear that such representative has no *locus standi* in the case. In criminal cases, in which the sentence involves a fine or forfeiture of property, the representative of a deceased convict is, no doubt, interested in procuring a reversal of such sentence, and the Legislature might, if it had seen fit, have given to such representative the right of prosecuting an appeal. But it has not seen fit to do so. That right is given to the convict only; and, when he dies, no one can be heard in support of the appeal.

The question remains,—whether, after the death of the appellant, we ought, as an Appellate Court, to consider the propriety of the conviction and sentence, notwithstanding that there is no longer any person in existence who can prosecute the appeal. I think that we ought not. Section 280 of the Criminal Procedure Code says that "the Appellate Court, after perusing the proceedings of the lower Court, and after hearing the appellant, his counsel, or agent, if they appear * * * may alter or reverse the finding and sentence or order of such Court, and may, if it see reason to do so, enhance any punishment that has been awarded, or order the appellant to be re-tried." It is manifest that, when the appellant is dead, we are unable to exercise most of the functions assigned by this section to a Court of Appeal. We cannot hear the appellant. We cannot enhance any sentence of imprisonment. We might enhance a fine; but, by so doing, we should only be punishing an innocent person, who has had no

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opportunity of being heard. We cannot order the appellant to be re-tried. It being, therefore, impossible for us to deal with the appeal thoroughly, I do not think that we ought to "peruse the proceedings" for the purpose of forming an opinion on the facts, and on the chance that we may thereupon find some ground for interfering on behalf of the convict, or rather of his representative.

In a recent case the Chief Justice and myself did consider the proceedings in a criminal case after the death of the convict. But the proceedings in that case had been called for under section 297, and we were sitting as a Court of Revision. No person has any right to be heard before the High Court in the exercise of its powers of revision. The Court is not supposed to be acting on the application of the convict, but in the exercise of its power of supervision over subordinate Courts, and with a view to correcting their errors. I think that we should have power to interfere in the present case, as a Court of Revision, if we saw any error, in law, invalidating the conviction, or if the sentence were too severe for the offence which has been held by the Sessions Court to be proved. But I can see no error in law, nor is the sentence excessive, if the facts be as the Sessions Court has found them. We cannot, therefore, exercise our powers of revision; and, considering the case before us solely as an appeal, I am of opinion that the appeal abated on the death of the appellant, and that our functions as an Appellate Court ceased.

KEMBALL, J.:—I agree in thinking that the representatives of the deceased convict cannot prosecute this appeal. But I am unable to concur in the view that the appeal abated, and our functions as an Appellate Court ceased upon the death of the appellant.

The question is not without its difficulties; but my opinion is that, as the hearing of the appellant, his counsel, or agent, is not an indispensable condition to considering an appeal, and as every thing that was necessary to be done to enable us to hear this appeal was done before the death of the appellant, we are bound, having the record and proceedings, before us, to dispose of the case on its merits.

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Assuming that the law imposes no obstacle, I do not think the question of our ability to proceed ought to be affected by the consideration that we are unable to exercise some of the discretionary powers vested in us as a Court of Appeal, or able to exercise others to the detriment of an innocent man unheard. It may, or may not, be to the interest of the representative to clear the memory of the deceased appellant; but, irrespective of that question, I think the balance of advantages to such representative is in favour of the appeal being considered. Supposing the fine not to have been paid at the time of his death, the property of a deceased convict is, as we know, answerable in the hands of his legal representative for such fine, provided that the period limited for its levy has not expired. And there is this further to be considered, that the Appellate Court, in consenting to call for the papers, has so far pronounced in the convict's favour.

It is an undoubted fact that a great number of appeals are disposed of by this Court, without the appellants being heard in person or by counsel; probably because the appellants are in jail and are too poor or too ignorant to employ counsel. No doubt the proviso as to appearance in section 280 of the Criminal Procedure Code applies to such cases; but whatever may have been the intention of the Legislature, it would also literally apply to the case now under consideration. I have no doubt that, as a Court of Revision, we could dispose of this case, but I think we are bound to decide it as a Court of Appeal.

[The learned Judges, having differed in opinion, as appears from the above minutes, the case was laid before the Honourable Chief Justice under the provisions of section 271 of the Code of Criminal Procedure.]

WESTROPP, C. J. :—It is true that the fine, which is leviable out of moveable property only of the convict (Criminal Procedure Code, section 307, *Reg.* v. *Lálla Kárwar* [1]) continues to be so leviable after his death (Penal Code, section 70 [2]), and, therefore, his re-

(1) 5 Bom. H. C. Rep. 63 Cr. Ca.

(2) In England the executor or administrator of the offender is bound to pay such a fine out of the assets come to his hands—(2 Williams on Exrs. 1740, 7th edn.)

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presentatives or legatees, as the case may be, are, if the fine have been wrongfully imposed, injuriously affected after his death by the sentence which so imposed the fine, and have an interest in continuing the appeal which he had instituted in his life-time. There is not, however, so far as I can perceive, any authority given, either expressly or by direct implication, to them to continue such an appeal, or to bring a new appeal. The Criminal Procedure Code has not made any provision for the continuance of the appeal either by the heir, or devisee, or executor of the deceased convict, or by any other person. The High Court cannot itself assume the position of the appellant and conduct the appeal, and has not power conferred upon it to depute any other person to do so. It has been frequently held in England that an appeal lies only where it is given by statute, expressly or by inevitable implication, and in this respect differs from a *certiorari*, which is a common law right, and always lies, unless it be expressly taken away. (The cases are collected in 1 Burns' Justice, Titles 'Appeal,' p. 219, and '*Certiorari*,' p. 617, 30th edn.) Section 286 of the Criminal Procedure Code prohibits appeals in any case except those provided for by the Code itself, or by any law for the time being in force. The power of revision in the High Court is not, indeed, a common law right like the writ of *certiorari*, but it is given by section 294, 297 of the Criminal Procedure Code (1872) in the widest terms, and is even more extensive than the proceedings by *certiorari* to which the Court of Queen's Bench resorts upon application only, whereas the High Court may and frequently does exercise its power of revision *ex mero motu*. Section 297 shows that the case may be either called for by the Court itself, or may be reported for orders, or brought to the knowledge of the Court in any way, so that, even though there may be no right in the next of kin, legatee, or other representative of the deceased convict to appeal or continue an appeal already lodged by the convict, such representatives are not without the means of attaining justice. They may bring their grievances to the knowledge of the Court, which will, if a *primâ facie* case for interference be shown, call for the record with a view to revision and rectification. In the case of an appeal the appellant has the carriage of the proceedings, but in the exercise of its revising power the High Court conducts the proceeding.

It is an important branch of its duty of supervision of the Courts subordinate to it. So in England "it is the undoubted prerogative of the Crown to see that all inferior jurisdictions are kept within their proper bounds, and on that principle the whole doctrine of *certiorari* proceeds,"[1] and, therefore, the Court of Queen's Bench, the medium through which the Crown exercises that prerogative, having a general superintendency over all Courts of inferior jurisdiction, may award a writ of *certiorari* to remove the proceedings from any of them, unless some particular statute or charter invests them with absolute judicature.[2] The circumstance that the jurisdiction under that writ is one of supervision and not of appeal, may account for the decision in *Reg.* v. *Roberts*[3] which is shortly reported thus:—"The defendant, being a bricklayer, was convicted for not building party walls according to the statute, and having brought a *certiorari* died before argument, notwithstanding which the Court would go on and affirm the conviction."[4]

If I am right in supposing that the determination of the Court of King's Bench in that case proceeded upon the principle of supervision, it is an *à fortiori* precedent for the High Court, which, in the exercise of its duty of superintendence, may and, perhaps, most frequently does act *ex mero motu*. I have not been able to find any instance of the Court allowing an appeal from a conviction or a writ of error in a criminal case to proceed where the appellant or plaintiff in error had died. I infer from this that the Court of Queen's Bench would regard the proceedings in such cases as having finally abated, and would, in a manner, apply to such proceedings the maxim which Courts do apply to civil actions, and more especially to such actions when in form *ex delicto*—"*actio personalis moritur cum personâ.*" I do not, however, know any criminal case in which the English Courts have expressly resorted to that maxim.

(1) *Per* Foster, J., in the case of the *King* v. *Berkley*, 1 Kenyon 81 at p. 103.

(2) 1 Burns' Justice of the Peace, tit. '*Certiorari*,' pp. 616, 617.

(3) 2 Strange's Rep. 937.

(4) See also *Rex* v. *The Justices of Yorkshire*, 9 Dow. and Ry. 204, which, however, being an application by two defendants, is not so much in point as *Rex* v. *Roberts*.

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My opinion is, that the appeal in the present case has abated, and cannot be permitted to proceed farther. I think that the High Court has, however, the right to call for the record, and make such order thereon as it may deem to be due to Justice. I do not understand that my opinion is required by my brothers Melvill and Kemball on the question whether such a case has been made as to render it desirable that the record should be brought up.

April 29. PER CURIAM:—The appeal abates.

Order accordingly.

[ORIGINAL CIVIL.]

Before Sir M. R. Westropp, Kt., Chief Justice, and Sir Charles Sargent, Kt., Justice.

March 23. CASSUM JOOMA BY HIS CONSTITUTED ATTORNEYS KHIMA DOLLA & Co., TRADING UNDER THE NAME OF KHIMA DOLLA, (PLAINTIFF) *v.* THUCKER LILADHUR KISSOWJEE (DEFENDANT).*

Splitting cause of action—Tradesman's account—Act IX of 1850, *Section* 34—*Small Cause Court jurisdiction.*

A tradesman cannot, by keeping separate accounts of his dealings with a customer, split his cause of action so as to bring his suit within the jurisdiction of a Small Cause Court in the Presidency towns.

THIS was a case referred for the opinion of the High Court, under section 7 of Act XXVI of 1864, by J. O'Leary, First Judge of the Court of Small Causes at Bombay.

The plaintiff sued to recover from the defendant the amount due on an adjusted account for goods sold and delivered. The adjustment was admitted, and also the fact that the obligation to pay, arising under it, had never been discharged. The defendant was indebted to the plaintiff on six different accounts, each of which had been separately adjusted. The accounts extended over the period between the month of July 1874 and February 1877, and the aggregate amount due, at the date of the last adjustment, was Rs. 4,540-8-3. Each of the accounts was kept in a separate book, and it appeared that payments had been made in respect of some

* Suit No. 12,398 of 1877.

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of the later accounts so as to keep the amount due in respect of them, under the sum of Rs. 1,000. The present suit was brought to recover Rs. 967-12-0, which was the amount due upon the earliest of the accounts. The adjustment of this account had taken place on the 7th July 1874.

On the 18th May 1877, Cassum Joomá, by deed, assigned the total amount (Rs. 4,540-8-3) due to him from the defendant to the firm of Khimá Dollá. The deed recited that the debt was due on foot of several accounts, signed and adjusted by the defendants, and it specified the different accounts and the amount due on each. It purported to assign "all that the said sum of Rs. 4,540-8-3," and it contained the usual power to sue for and recover "the said sum of Rs. 4,540-8-3."

By a letter of 4th January 1877 the defendant received notice of the assignment, and was called upon to pay to Khimá Dollá "the sum of Rs. 4,540-8-3, being the total amount due."

The case stated by the First Judge, contained the following observations:—

"For the defendant it was contended that the plaintiff, Cassum Joomá, having assigned all his interest, could not, either in person or by attorney, sue for and recover the same, and it was further contended that, if Khimá Dollá & Co. were to be regarded as plaintiffs, their claim was for a sum exceeding Rs. 1,000, and that they could not sue in this Court without abandoning the excess.

"I was of opinion that, as the suit was constituted, the plaintiff might have a decree.

"The case was not argued before me with reference to the judgment of Couch, C.J., in the case of *Blackwell & Co.* v. *Sumár Ahmed*, (6 Bom. H. C. Rep. O. C. J. 88,) as to whether the letter of 4th June 1877 did not consolidate the claims.

"It will be observed that the adjustment sued upon, was made on July 7th, 1874, so that more than three years have now elapsed from the date of the adjustment. I would have been willing to make any amendment in the case as to names of parties, or otherwise, necessary for the purposes of justice.

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"Cassum Joomá was in Court assenting to the carrying on of the suit.

"I gave judgment for the plaintiff for the sum of Rs. 967-12-0 and costs, and I certified plaintiff's costs, Rs. 34. At the request of defendants' solicitor I gave the above judgment contingent upon the opinion of the High Court on the question—whether, under the above state of facts, this Court was competent to make a decree in the case against the defendant."

Inverarity for defendant:—The assignment made the debt a debt due to Khimá Dollá. The debt assigned is a debt of Rs. 4,540, and the only power given is a power to sue for that sum. We say the notice of the 4th June 1877 consolidated the claim. There is only one cause of action in respect of all six accounts, and the plaintiff is attempting to split his demands contrary to *Grimbly* v. *Aykroyd*.(1) The test is, whether the whole claim could not have been included in one count. The case is not distinguishable from the case of *Blackwell & Co.* v. *Sumâr Ahmed*(2). *Wickham* v. *Lee*(3) was also cited.

B. Tyabji for plaintiff:—The transactions were distinct, and the parties have throughout treated the accounts as separate, which they were entitled to do. Payments have accordingly been made in respect of the subsequent accounts, leaving the amounts due on the prior accounts undiminished. The accounts are in separate books. These circumstances show the intention of the parties. The cases show that the course of dealing is to be regarded by the Court.

WESTROPP, C.J.:—We think that this is the case of a tradesman's running account, and, therefore, falls within the authority of *Grimbly* v. *Aykroyd*.(4)

Cassum Joomá, the creditor, appears, indeed, to have kept separate accounts, in the hope of being thereby enabled to split his demand, and to sue on each of them in the Court of Small Causes, and thus to frustrate the law which prohibits the splitting of a cause of action. We must decline to co-operate with him in attaining that object.

(1) Ex. 479. (2) 6 Bom. H. C. Rep. 88, O. C. J. (3) 12 Q. B. 521.
(4) 1 Ex. 479.

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Reverse the judgment of the Small Cause Court, and let a non-suit be entered.

The plaintiffs must pay the cost of the suit and of this reference.

Order accordingly.

Attorneys for the plaintiff:—*Messrs. Balcrishna and Bhugwandás.*

Attorneys for the defendant:—*Messrs. Lynch and Tobin.*

[ORIGINAL CIVIL.]

(FULL BENCH.)

Before Sir M. R. Westropp, Kt., Chief Justice, Mr. Justice Bayley, Mr. Justice Kemball, and Mr. Justice Green.

May 1.

SAVITRIBÁI, WIDOW OF DHÁKJI BÁLCRUSTNA (ORIGINAL PLAINTIFF), APPELLANT, *v.* LUXIMIBÁI, WIDOW OF GANOBÁ ANANTA, AND SADÁ SIV GANOBÁ (ORIGINAL DEFENDANTS), RESPONDENTS.*

Hindu law—Maintenance—Nephew's widow.

In the Island or Presidency of Bombay, a Hindu widow, voluntarily living apart from her husband's relatives, is not entitled to a money allowance as maintenance from them if they were separated in estate from him at the time of his death, nor is she entitled to such maintenance from them whether they were separated or unseparated from him at the time of his death, if they have not any ancestral estate or estate belonging to him in their hands.

The doctrine, that in certain relationships, and independently of the possession of ancestral estate, maintenance is a legal and imperative duty, while in other relationships it is only a moral and optional duty, discussed.

Semble—A Hindu widow, who has received a full share as and for her maintenance, cannot, when she has exhausted it, enforce from the relatives of her husband, or from the family estate, a further allotment, or a money allowance for maintenance.

Semble—The *stridhan* of a Hindu widow should be taken into account in determining whether and to what extent she should have maintenance assigned to her.

S, a Hindu widow voluntarily living apart from her husband's family, sued his paternal uncle, the nearest surviving male relative of her husband, for a money allowance as maintenance. *Held* that such suit was unsustainable for either of the two following reasons, viz.: 1. That the defendant was separated in estate from the plaintiff's husband at the time of his death. 2. That at the institution of the suit the defendant had not in his hands any ancestral estate, or any estate which had belonged to the plaintiff's husband.

* Suit No. 325 of 1873. Appeal No. 261.

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Decisions of the Bombay Sadr Adálat on the right to maintenance reviewed.

Bái Lakshmi v. *Lakhmidás Gopaldás* (1 Bom. H. C. Rep. 13), *Chandrábhágábái* v. *Kashináth* (2 Bom. H. C. Rep. 323), and *Timmáppá* v. *Parmeshriámmá* (5 Bom. H. C. Rep. 130 A. C. J.) disapproved.

Udarám Sitárám v. *Sonkábái* (10 Bom. H. C. Rep. 483) considered.

Rujjomoney Dossee v. *Shibchander Mullick* (2 Hyde. 103), *Khetramani Dási* v. *Káshinath Dás* (2 Beng. L. R. 15 A. J.), and *Gangábái* v. *Sitárám* (Ind. L. R. 1 All. 170) approved and followed.

THIS was an appeal from a decree of Marriott, J., for the defendants in a suit for maintenance brought by a widow against her deceased husband's grandmother and uncle. It was proved that, many years previously to the suit, and previously to the death of the plaintiff's husband, his uncle (*i.e.*, the second defendant Sadásiv) had sued for and obtained a partition of the family property, and that he had not subsequently become re-united in estate with any member of the family. After the death of the plaintiff's husband, his uncle (the defendant Sadásiv) took the plaintiff to his house for the purpose of performing the requisite funeral ceremonies in honour of the deceased, and he offered to maintain her and her infant daughter if they continued to reside with him; but the plaintiff, after remaining thirteen days in his family, departed with her child, and went to reside with her own father. She alleged that Sadásiv and his wife did not treat her well; but the Court was of opinion that she had no cause of complaint against Sadásiv, nor any excuse for leaving his house, but that she desired to obtain from him a separate maintenance. The facts of the case are fully set forth in the judgment of the Full Bench.

B. Tyabji (with him *Telang*) for appellants:—We admit that the appellant failed at the trial to establish her right to maintenance out of the Fanaswádi property, purchased by the defendant Luximibái. But we contend that the defendant Sadásiv, although he may have spent his share of the family property, continues to be liable to maintain the plaintiff as being the widow of his nephew Dhákji. "Females of the family" have a right to maintenance: Manu, ch. III, pl. 55 to 60; Cole. Dig., bk. IV, ch. I, sec. 2, pl. 39 to 43. As to the persons included in this class: Cole. Dig., bk. V, ch. VIII, sec. I, pl 399, cl. 6: *Ibid.*, bk. II, ch. IV,

sec. 1, pl. 11, 12. Men are prohibited from alienating the whole of their property, in order to prevent their being incapacitated from maintaining their families: Cole. Dig., bk. II, ch. IV, sec. 2, pl. 18.

As to the right to maintenance, 2 *West and Bühler*, Intro., p. 30; *Bâi Lakshmi* v. *Lakhmidás Gopaldás*,(1) *Chandrábhágábái* v. *Kashináth Vithal*,(2) *Timmáppá* v. *Parmeshriámmá*,(3) *Udarám Sitárám* v. *Sonkábái*,(4) *Visalatchi Ammal* v. *Annasamy Sastri*,(5) *Rájá Pirthee Singh* v. *Ráni Rajkooer*.(6) These cases show that residence with her husband's family is not essential to the widow's right. Family property after the partition retains its ancestral character (per Couch, C.J., in *Lakshmibái* v. *Ganpat Morobá*(7)), and therefore, we contend, continues liable to maintain the females of the family.

The case of *Khetrámáni Dási* v. *Kashináth Dâs*(8) should not be followed in Bombay. It proceeds on a distinction between moral and legal precepts not recognized here: per Sausse, C.J., in *Pránjivandás* v. *Devkuvarbái*.(9) The husband's nearest kinsman is bound to support the widow (Cole. Dig., bk. IV, ch. I, sec. I, pl. 13), and if his family be extinct or destitute of means, her father's family must do so: *Ibid.* The plaintiff left the family house in consequence of proper food not having been provided for her child. This fully justified the step.

Latham (with him *Inverarity*) for the respondents:—Although partition leaves the property ancestral as between the divided parcener and his issue, it is by partition discharged of general family burdens, including maintenance of the widows of other parceners. The term ancestral property has no meaning except as between a man and his descendants. The son of a brother can only claim through his father. If the property be discharged as regards the latter, it is so as regards the former. The observa-

(1) 1 Bom. H. C. Rep. 13. (2) 2 Bom. H. C. Rep. 323, A. C. J.
(3) 5 Bom. H. C. Rep. 130, A. C. J. (4) 10 Bom. H. C. Rep. 483.
(5) 5 Mad. H. C. Rep. 150.
(6) 12 Beng. L. Rep. 238; see 20 Calc. W. R. 21 Civ. Rul.
(7) 5 Bom. H. C. Rep. 128, 135 O. C. J.
(8) 2 Beng. L. R. 15, A. J., S. C. 9 Calc. W. R. 413 and 10 *Ibid.* (F. B.) 89.
(9) 1 Bom. H. C. Rep. 130; see p. 133.

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tions of Couch, C.J., in *Lakshmibái* v. *Ganpat Morobá*,(1) which have been relied on, are not inconsistent with that view.

A man may possibly be bound to maintain his widowed daughter-in-law; but where is the Court to stop if it holds him bound to maintain his separated nephew or that nephew's widow, or the widow of any *sapinda*, separated or unseparated, however remote? The cases of *Bâi Lakhsmi* v. *Lakhmidás Gopaldás*,(2) *Chandrábhágábái* v. *Kashináth Vithal*,(3) and *Timmáppá* v. *Parmeshriámmá*,(4) which have been cited in support of the plaintiff's right, do not rest upon any quoted authority. The case of *Udárám Sitárám* v. *Sonkálái*(5) does not, so far as its facts go, support the plaintiff's claim, and the *dicta* relied on were extra-judicial, and not sustainable by the treatises in Hindu law. The case of *Visalatchi Ammal* v. *Annasamy Sastri*,(6) so far as decided by the High Court, is not in point. The texts quoted from Manu sound in morality and not in law: *Khetrámáni Dási* v. *Káshináth Dás*,(7) *Rujjomoney Dossee* v. *Shibchandar*.(8) The duty of maintenance is as much inculcated in the text books of Bengal as in those of Bombay. If there be an obligation to maintain, it extends only to aged parents, wife, and children who are minors. See Strange's Manual, pl. 208, 209, quoting the Mitakshara.

From the Mayukha, ch. IV, sec. XI, pl. 9, it is to be inferred that the burden of maintaining other persons is imposed merely upon him or her who takes the family estate. The distinction as to separation, taken in *Rámábai* v. *Trimbak Ganesh Desái*,(9) is important. There is no difference in principle between a deserted wife (the plaintiff in that case) and a widow. The evidence here shows that the plaintiff left the family house with her child at her own pleasure, and was not ill-treated.

Lakshman Rámchandra v. *Sarasvatibái*(10) was also cited on behalf of the respondents.

(1) 5 Bom. 128, O. C. J.
(2) 1 Bom. H. C. Rep. 13.
(3) 2 Bom. H. C. Rep. 323.
(4) 5 Bom. H. C. Rep. 130, A. C. J.
(5) 10 Bom. H. C. Rep. 483.
(6) 5 Mad. H. C. Rep. 150.
(7) 2 Beng. L. R. 15, A. J.
(8) 2 Hyde. 103.
(9) 9 Bom. H. C. Rep. 283.
(10) Sp. Ap. 169 of 1874. Printed Judgments for 1875, pp. 84 and 87, since reported in 12 Bom. H. C. Rep. 69.

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WESTROPP, C.J. :—Ganobá Anantá, the husband of the first defendant Luximibái, died, leaving, by her, two sons, Sadásiv (the second defendant) and Bálcrustna, and one daughter Anantibái. Bálcrustna was transported to the Straits Settlements, whence he returned in 1850 or 1851, and died in 1867 or 1868, leaving one son Dhákji, of whom counsel stated on the argument of this appeal that he (Dhákji) was born in 1839, before the partition which we shall presently mention, but of this there is no proof. It was not asserted that he was married until after the partition. He has died, leaving, surviving him, his widow, the plaintiff Savitribái, and an infant daughter who died during the pendency of this suit and before the present appeal. In 1852 Sadásiv Ganobá instituted a suit against his cousins, the sons of Shivshanker, brother of Ganobá Anantá, and his (Sadásiv's) brother Bálcrustna, and a Parsi mortgagee, at the Equity Side of the late Supreme Court, in which suit a decree for sale and partition was made by Sir Erskine Perry on the 25th September 1852. The family property, the subject of that suit, consisting of a house in the Kalbádevi Road and a chawl, with an appurtenant bungalow, situated in Fanaswádi or Agiary Lane, was sold in the year 1853, pursuant to that decree. By the plaint in the present suit the plaintiff has claimed a moiety of the chawl and premises in Fanaswádi, or, in the alternative, an award of maintenance generally, without referring to any particular property. At the sale in 1853, the chawl and bungalow in Fanaswádi Lane were purchased for Rs. 4,400 by one Dámodhar Rámchander in his own name, but, in fact, for the first defendant Luximibái, to whom he conveyed them by deed on the 7th August 1854. The Rs. 4,400 are satisfactorily proved to have been part of the proceeds of her personal ornaments (constituting her *stridhan*) sold for her by Crustnáth Rámchander, a clerk in the office of Messrs. Craigie, Lynch, and Owen, who deposes that he has known the defendant's family for thirty years, and has, during twenty-eight years of that time, managed the pecuniary affairs of the defendant Luximibái, in which statement, and especially as to the sale of the jewels for her, he is, in his evidence, supported by Dámodhar Rámchander as well as by the defendant Sadásiv. About Rs. 5,200 or 5,300 were realized by

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the sale of those jewels. Returning to the partition suit, it appears to have been concluded by the distribution, by the Master in Equity, of the proceeds of the sale of the immoveable property in Kalbádevi Road and Fanaswádi, already mentioned; one moiety of which proceeds was made over, in accordance with Sir E. Perry's decree, to the sons of Shivshanker, and the other moiety to Sadásiv and Bálcrustna in the form of a cheque for Rs. 5,506-1-0 on the Oriental Bank, which cheque was, in August 1853, given to them by the Master in Equity. Sadásiv deposes that he and Bálcrustna went together to the bank, and, having obtained the amount of the cheque, returned home, and then and there divided that amount equally between them, and as to this division of the money, Sadásiv is corroborated by Crustnáth Rámchander, who has sworn that it was made in his presence. Sadásiv, who is a clerk in the service of the G. I. P. Railway Company, and has been so for several years, said that he expended the whole of his share of the Rs. 5,506-1-0 in paying debts and in purchasing about Rs. 500 or Rs. 600 worth of ornaments for his wife, and that he did not know how Bálcrustna expended his share of the Rs. 5,506-1-0. An attempt was made by the plaintiff, in the course of her case, to prove that the chawl at Fanaswádi was, in fact, bought by Sadásiv and Bálcrustna jointly, and that Dámodhar Rámchander was their trustee for that purpose. Her witnesses to establish that state of facts were Náráyan Luxuman and Vishnu Máhádev. The former was a clerk in the office of Mr. Hancock, a solicitor, and, as such, conducted the partition suit on behalf of Sadásiv, the plaintiff in it, and also the case of Bálcrustna as one of the defendants in the same suit. He deposed that, at the time of the sale in it, Sadásiv said to him that "the property to be sold was ancestral property, and that he should keep one portion of it for himself and his family." He also said that "Sadásiv purchased the chawl in the name of his mother," but he admitted that he (the witness) did not know whence the purchase-money for it came. He said that Bálcrustna, from the time of his return from Singapore to his death, lived in the bungalow appurtenant to the chawl, but his memory of transactions to which he deposed seemed to be very imperfect; he admitted that he had only seen

Bálcrustna in the chawl three or four times, and that he knew very little either of Sadásiv or Bálcrustna since the suit of 1852. The alleged conversation as to Sadásiv purchasing a portion of the family property was denied by Sadásiv on solemn affirmation. The other witness, Vishnu Máhádev, had, as a tenant, occupied a part of the Fanaswádi chawl, and swore that he paid rent during Bálcrustna's life to him for it, but he admitted that he did not obtain from him any receipt for that rent, and that his tenancy concluded by his being ejected by Sadásiv (on behalf of his mother Luximibái), who had to sue the witness Vishnu Máhádev in the Court of Small Causes for the last three months' rent, for which he obtained a decree, although the witness admitted that only one month's rent was due. This same witness denied, in the presence of Dr. Dallas, the Attorney for Paupers, that any such suit was brought against him; and his evidence as to the payment of rent to Bálcrustna (which was fully contradicted by the defendant Sadásiv, who assisted his mother, the defendant Luximibái, in managing the Fanáswádi property,) seems to have been undeserving of credit, and to have been inspired by his resentment against Sadásiv. Purshotam Khandushet was also examined on behalf of the plaintiff; but he evidently knew little of the parties, and established nothing of importance. Under these circumstances, we were not surprised to find that Mr. Tyabji, as counsel for the plaintiff, admitted, at the conclusion of the case for the defendants in the Division Court, that the plaintiff had "made out no case for a charge on the chawl" of her maintenance. An attempt, by the witnesses for the plaintiff, was made to show that Bálcrustna, after his return from transportation until his death, lived in union with Sadásiv, but that attempt was completely defeated by the evidence for the defence, which showed that, at the time of the partition, already mentioned, Bálcrustna had lived in the same house with Sadásiv and Luximibái at Vittulwádi, but almost immediately afterwards left them and lived separately (until within six months of his death) at Máhim, only occasionally visiting Sadásiv and Luximibái, who had, about one year after Bálcrustna left them, gone to live at Fanaswádi. On Bálcrustna's being seized by his last illness, he was, on medical advice, brought,

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about six months before his death, by Sadásiv to Bombay, where, in 1867 or 1868, Bálcrustna died. The plaintiff was examined on her own behalf, and admitted that she and her husband Dhákji lived in the house of his maternal uncle Bhagvantráv Rámchander, and that Dhákji (who, if his father Bálcrustna had left any property on his death in 1867-1868, would have taken it) died in 1872 without leaving any property: on which event, his uncle, the defendant Sadásiv, took her to the house in which he lived, for the purpose of performing the requisite funeral ceremonies in honour of Dhákji, and offered to maintain her and her infant daughter if they continued to reside with him; but she, after a sojourn of thirteen days in his family, departed with her child, and went to reside with her own father. She alleged that Sadásiv and his wife and the tenants at Fanaswádi did not treat her well. She admitted, however, that no personal violence was used to her, and eventually her complaint did not go beyond an assertion that the comfort of herself and her child was not sufficiently considered by Sadásiv and his wife, a woman of about the same age as the plaintiff; and that the child was not supplied by them with milk. The plaintiff did not offer any testimony, except her own, to prove ill-treatment, and the impression which her evidence left on our minds is that she had not any serious cause for complaining against Sadásiv or leaving his house, but merely that she desired to obtain from him a separate maintenance. She had originally presented a petition for the aid of the attorney for paupers, Dr. Dallas, which was, in the usual course, referred to him. On inquiry into her case, he declined to institute a suit for her as a pauper, and advised her to reside with her husband's uncle, the defendant Sadásiv, and she admits that her father gave her similar advice, but she declined to act upon it. Afterwards, with the pecuniary assistance of her father or some other relative, she brought the present suit against Luximibái (the mother of Sadásiv and Bálcrustna and paternal grandmother of Dhákji) and Sadásiv. The Court of first instance (Marriott, J.) dismissed the suit with costs.

The plaintiff subsequently was granted the aid of the attorney for paupers, Mr. Fletcher, to bring this appeal against the decree of the Division Court, and the appeal was very well argued by

Mr. Badrudin Tyabji and Mr. Telang on her behalf, and Mr. Latham and Mr. Inverarity on behalf of the defendants.

The result of the above-stated facts is that there has been a complete partition of the family property, not only between Shivshanker's branch on the one side, and Ganobá's branch on the other, but also between Sadásiv and Bálcrustna, the sons of Ganobá, both as regards residence and property. So far as appears, none of Bálcrustna's share is forthcoming, and he had probably expended the whole of it before his death. Sadásiv's share has also been expended, and he, at the time of the institution and hearing of this cause, appeared to be dependent on his salary as a clerk for his livelihood. The Fanaswádi property cannot, since the partition, and since the sale to Luximibái, be deemed to constitute any part of the paternal family estate. When purchased by her, with the proceeds of her jewels, it became her *stridhan*, and is not, in anywise, liable to the maintenance of the plaintiff Savitribái. Independently of Fanaswádi, it was not contended that this suit could be sustained against Luximibái, or that she was personally liable to maintain the plaintiff. The suit, therefore, is thus reduced to one against Sadásiv personally as uncle of the husband of the plaintiff. The question is—can the plaintiff, not finding it agreeable to live in the house of her husband's uncle, sustain this suit for a money allowance, by way of maintenance, against him who has separated in estate, so far back as 1853, from the branch of the family to which her husband and his father (Sadásiv's brother) belonged, who had no paternal estate in his hands at the institution of this suit, and who did not, and could not, so long as the plaintiff lived, inherit any property from her husband upon whom the estate (if any) of his father Bálcrustna would have devolved.

We think that we may assume it to be well-settled Hindu law in this Presidency that the widow whose husband was, at his death, undivided in estate from his father, or the widow of one undivided, at his death, in estate from his brothers, or nephews, or other relative, would, in the first case, if there be sufficient ancestral estate in the hands of the surviving father, or, in the second case, if there be sufficient ancestral estate in the hands of

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the surviving brothers, nephews, or other relative, be entitled to a reasonable maintenance out of such estate: Mayukha, ch. IV, sec. VIII, pl. 7; Narada, XIII, pl. 25, 26, 27, 28;[1] *Jethee* v. *Sheobái*,[2] *Vishnu* v. *Gangábái*,[3] *Bhagvant Govind* v. *Guzábái*,[4] *Ahilábái* v. *Mohunji*,[5] *Bái Amrit* v. *Bái Mánik*.[6] The same law has been laid down, by a Full Bench in the N. W. Provinces, in the case of a widow against her father-in-law in the possession of ancestral estate: *Lalti Kuar* v. *Gangá Bishnu*.[7]

On the question whether such a widow can claim maintenance against her husband's father, brother, or other relatives not in the possession of any ancestral estate, or separated in estate from her husband, there have been conflicting decisions. We proceed to examine them and the grounds on which they rest.

In *Bâi Lakshmi* v. *Lakhmidás Gopaldás*,[8] which was cited for the plaintiff, a widow sued her step-son for maintenance. The Sadr Amin and the Assistant Judge made decrees against her—the latter on the ground that, having obtained a share of her deceased husband's estate and having lived by money-lending for thirty years, she was not entitled to maintenance as against the defendant, or, after his death, which occurred during the suit, against his sons. A Division Bench of the High Court (consisting of Newton and Warden, JJ.) in 1863 reversed that decree on the ground that, notwithstanding the above facts, the obligation of maintaining her would still attach to her husband's relatives, should she then be destitute of the means of living, and the case was remanded in order that the question of her destitution should be enquired into. Those learned Judges cited no authority for their opinion, and the report does not show that any was mentioned by the pleaders. The Mayukha (ch. IV, sec. 4, pl. 19) recognizes the right of a step-mother or step-grandmother to a share of the family-estate, *i.e.*, in substance to maintenance out of it as against her step-son or step-grandson

(1) Dr. Jolly's Trans., pp. 97, 98; 3 Dig., bk. V, ch. VIII, pl. 405, p. 474.
(2) 2 Borr. 640, 643, 644.
(3) 1 Morr. S. D. A. Rep., 162.
(4) 8 Harr. 120.
(5) 9 Harr. 397.
(6) 12 Bom. H. C. Rep. 79.
(7) 7 N. W. P. Rep. 261.
(8) 1 Bom. H. C. Rep. 13.

in whose possession it may be; but we find no Hindu authority for saying that, after she has received and spent her full share given to her as maintenance, she is entitled again to charge the estate, or her step-son or step-grandson, for another share or further maintenance. It seems against reason, and a premium upon extravagance, to hold that she would be so entitled. We are not aware that there is any Hindu authority for saying that the text of Manu, ch. VIII, pl. 389, and 3 Dig., p. 400, to which we shall presently advert, have been so applied to step-sons or their issue.

This (*Bâi Lakshmi* v. *Lakhmidás Gopaldás*) is the first reported case in this Presidency in which there has been ruling that, after a widow has received a share of the family estate for her maintenance (and she does not appear to have alleged that it was not as full a share as she could lawfully claim), she has been permitted, after she has exhausted that share, to maintain a suit for further maintenance either against the estate or the defendants personally.

In the absence of any authority quoted for such a decision, it is impossible to regard it as satisfactory. Even if it be sustainable, it would not support the present suit, which is not against a step-son or his issue, but against an uncle of the plaintiff's husband.

Chandrábhágábái v. *Kashináth Vithal*[1] has also been cited for the plaintiff. There, a widow whose husband had been separated in estate from his father, and who herself was residing in the house of her own father, sued her father-in-law for an annual money allowance to provide maintenance, clothing, &c., for her. The Munsif made a decree in her favour, which, however, the District Court reversed on two grounds: 1st, her husband's separation in estate from his father, the defendant; and, 2nd, that she had inherited property, and, therefore, was not in such indigent circumstances as to need maintenance from the defendant. She specially appealed to the High Court on three grounds: 1, that the circumstance of her succession to her mother's money did not deprive her of the right to maintenance against her late husband's family; 2, that her mother's money had been all expended by the plaintiff in funeral ceremonies for the benefit of

(1) 2 Bom. H. C. Rep. 323.

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her mother; and, 3, that the District Court omitted to raise an issue as to her then present circumstances. Newton and Warden, JJ., who had decided *Bái Lakshmi* v. *Lakhmidás Gopaldás*, reversed the decree of the District Court, and remanded the cause for the determination of the following points:—"1. Are the widow's present circumstances such as to give her a claim to maintenance? 2. If she is possessed of any property, what portion of it is her *stridhan?*" That case, as reported, is most unsatisfactory; neither the authorities (if any) cited to, or relied upon by, the High Court, for reversing the decision of the District Court, being specified. There is, moreover, an omission in the portion of the judgment at the top of page 325 of 2 Bom. H. C. Rep. On reference to the Court Minute Book we find that the passage should run thus:—"In accordance with previous decisions of this Court such part of the property in the plaintiff's hands (if any) as may be held to be her peculiar property should not be taken into account if she is in need of support." I cannot find any previous decision of the High Court to that effect. The case cited in 1 Norton's Leading Cases, 35, from 1 West and Bühler, p. 63, sec. 6, as being so, is a case of inheritance by the widow of a man who died separate and without issue, and not a case of maintenance. There is indeed in 1st Morris S. D. A. Rep. 162 a case (*Vishnu Dinkur* v. *Gangabai*) which may countenance that doctrine. It, however, not only seems in itself highly unreasonable, as a widow might have *stridhan* to an amount equal to or greatly exceeding the ancestral estate in the hands of her husband's family, but also opposed to the Mayukha (Ch. IV, sec. IV, pl. 18; sec. IX, pl. 3; see also Mitak., ch. I, sec. II, pl. 9; Daya Bhaga, ch. III, sec. II, pl. 31; 1 Stra. H. L. 171; 2 Yajnyavalkya, pl. 115.[1]) As the question whether *stridhan* should be taken into account does not arise here, we shall not dwell any longer upon the point.

The next case cited to us, on behalf of the plaintiff, is *Timmáppá* v. *Parmeshriámmá*,[2] decided by Warden and Gibbs, JJ. The statement of facts in the report being meagre, I have examined the record of that case. The plaintiffs were Parmesh-

(1) Roer and Montriou's Trans., p. 37. (2) 5 Bom. H. C. Rep. 130, A. C. J.

riámmá, the widow of Soobbhát (a brother of the defendant Timmáppá), and Honnámmá, the alleged widow of Manjá Bhat, son of Soobbhát and Parmeshriámmá, but of Manjá Bhat's death there was no proof. The plaintiffs sued for an allotment of maintenance and five years' arrears of it. The defendant Timmáppá pleaded (*inter alia*) that Soobbhát, the husband of Parmeshriámmá, had, by execution of a deed of partition, renounced all right to or interest in the family property. Kesha Bhát, the second defendant, did not appear. Devá, the widow of another brother, having stated that she was entitled to one moiety of the family property sought to be charged, was also made a defendant. The Munsif found that as Parmeshriámmá had been, twenty-four years previously, expelled from the family house, and as it was not proved that her son Manjá Bhat was dead, who had, in the year 1850, after the death of his father Soobbhát, brought and failed in a suit for a partition of the family property, neither of the plaintiffs had any right to sue the defendants for maintenance. The plaintiffs appealed against that decision to the District Court on the following grounds:—(1) "That the claim for a division of property, unsuccessfully set up by Manjá Bhat, constituted no obstacle to their suit for maintenance;" (2) "that the family being undivided, the defendants, who were in possession of the patrimony, were responsible for the plaintiffs' maintenance;" (3) "that their right to sustenance was not affected by Manjá's life or death;" (4) "that the evidence proved that the plaintiffs had been maintained from 1854 to 1860." The Acting District Judge held that the plaintiffs were entitled to maintenance. He admitted that they ought to have sued separately, as their rights were separate, but he gave no effect to that admission. Probably his reason for not doing so was that he was unwilling to put the parties to the expense of two new suits, or one new suit and an amendment of the other suit. He proceeded to say: "Manjá Bhat having sued in 1850, as is admitted, for an allotment of a share of the family property, and failed in that suit, no claim can, indeed, now be set up on the ground of his having been entitled or of his father's having been entitled to such a share; but, independently of that, the Hindu law, which gives the divided members of a family the reversion of a widow's estate, entitles

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the widow, on the other hand, when destitute, to sustenance at the hands of her husband's family, even though her husband could not have succeeded in a claim for an apportionment of a separate share of the patrimony. On this ground the widow Parmeshriámmá is entitled to support, and the principle extends to the case of Honnámmá. If she is destitute through the desertion of her husband, she is entitled to support at the hands of his family." The learned Judge did not cite any authority in support of the above proposition as to the liability of the defendants, as members of the family of the widows' husbands, to maintain those widows, although the husbands themselves could not by suit have obtained from the defendants any portion of the family estate remaining in their hands; that is to say, although those husbands, having already obtained their own share of the family estate, and thus being separate in estate from the defendants, could not, even though such share had been consumed, have compelled the more prudent defendants to share with them the residue of the family estate which had been assigned to them as their due proportion of that estate. It would need very strong and distinct authority, in the ancient treatises of Hindu law, to convince us that the widows of such separated husbands stand, as to maintenance out of such portion of the family estate as remains in the hands of the other ex-parceners, in a better position than the husbands themselves occupy with regard to any right to resort to that residue for a further share, albeit under the name and guise of maintenance. That the widow should have such a right is not by any means a *sequitur* of the rule which gives to the heirs of the husband, when divided from him, the reversion of his estate on the death of the widow.

Another circumstance in that case was that the defendant Timmáppá had offered to receive Parmeshriámmá into his house, and to support her there. Other decisions, to which we shall refer, show that, at the utmost, Parmeshriámmá had not any right to more than this, if to so much. The learned District Judge, however, said that "it would not be right to force her, against her will, to reside with Timmáppá," and mentioned the circumstance of Timmáppá's offer and her refusal as one amongst other reasons for only decreeing to the widows a bare subsistence.

He also refused to give to them any arrears, it not appearing that they had incurred any debts to provide sustenance for themselves. On special appeal to a Division Bench of the High Court (Warden and Gibbs, JJ.), the decree of the District Judge was affirmed. Gibbs, J., there said that every Hindu widow, whether her husband was divided from the family or not, is entitled, when in needy circumstances, to claim (*sic* in original) from her husband's relatives; but he referred to no other authority for that doctrine than *Bâi Lakshmi* v. *Lakhmidás*[1] and *Chandrábhágábái* v. *Kashináth*.[2] Of these the first, being against a step-son and his issue and not against a brother-in-law or father-in-law, was not in point, and both, as we have already said, are unsatisfactory, as not having any basis of cited authority. Gibbs, J., indeed, added that "the whole policy of the Hindu law is not to allow even a distantly related widow to starve," but for that proposition no other authority than the above cases was mentioned by the Court.

An unreported case (*Ningangavda* v. *Baslingavda*[3]) decided on the 20th July 1870 by Lloyd and Kemball, JJ., and Westropp, C.J., and in which maintenance was decreed, was cited on behalf of the plaintiff. I have examined the record and my own notes, and find that the case is not in point. It was a suit by a daughter-in-law against her father-in-law, and the latter did not plead that he was not in possession of any family property. The Assistant Judge noticed the fact that there was not any evidence as to the worldly circumstances of the parties. The father-in-law, in defence, would certainly have alleged that he had not any such property if the fact were so, but he did not; and in the argument before this Court it seems to have been assumed that there was ancestral property in his hands. His main ground of defence was that his deceased son, the husband of the plaintiff, had been adopted into another family, and, therefore, had ceased to belong to that of the defendant. The Assistant Judge as well as the Munsif found that there had not been any such adoption. With the exception of the asserted adoption, which failed in

(1) 1 Bom. H. C. Rep. 13. (2) *Ibid.* 323.

(3) Sp. Ap. No. 101 of 1870, unreported.

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proof, there was neither allegation nor evidence to show any separation between the defendant and his deceased son. Both, therefore, of the facts which are established in evidence here, viz., absence of family property and separation, were wanting in proof there. A question as to the jurisdiction of the Court of Small Causes arose, and was decided there, but is not material in the present case.

Rámábái v. *Trimbak Ganesh*,[1] decided by Sargent, C.J., (Acting) and Melvill, J., in September 1872, was a suit for maintenance and the means to pay rent for a residence, brought by a wife whose husband had deserted her and her minor son about six years previously, and not been subsequently heard of. She averred in her plaint that her husband and the defendants, his cousin and cousin once removed, were an undivided family owning ancestral property in which her husband was entitled to a share. The defendants alleged separation thirty years previously to the suit, and denied their liability to maintain the plaintiff. The Subordinate Judge found the family to be undivided, and decreed maintenance. The Assistant Judge, although of opinion that the defendants had behaved disgracefully, reversed the Subordinate Judge's decree, on the ground that "the plaintiff could not be presumed to be a widow, and that a wife could not claim maintenance from her husband's relations." On special appeal, the previous decision, *Bâi Lakshmi* v. *Lakhmidás Gopaldás*[2] and *Timmáppá Bhat* v. *Parmeshriámmá*[3] were cited. The High Court reversed the Assistant Judge's decree, and remanded the cause for re-trial, saying:—"No doubt, the authorities do not show that the relations of a deserted wife are under a personal liability to maintain her; but they do show that she is entitled to be maintained out of her husband's property to the extent of one-third of the proceeds of that property.[4] The appellant's allegation is that her husband's property is in the hands of the respondents, and available for her maintenance. *If the plaintiff's husband and the respondents are separate, and the former has taken his share*

(1) 9 Bom. H. C. Rep. 283. (2) 1 Bom. H. C. Rep. 13.

(3) 5 Bom. H. C. Rep. 130, A. C. J.

(4) *Vide* 3 Dig., bk. IV, sec. II, pl. 72, p. 420; 2 Stra. H. L. 45, 48, 51; *secus utem* 2 Macn. H. L. 110.

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of the property, the appellant has no claim upon the respondents; but if they are undivided, and the husband's share is available in the hands of the respondents, and the proceeds thereof are not accounted for by them, the appellant is entitled to receive maintenance from those proceeds to an extent not exceeding one-third of the amount." The effect here attributed to separation is important, and is inconsistent with the three cases cited for the plaintiff from the 1st, 2nd, and 5th volumes of the Bombay H. C. Reports, as there does not appear to be any sound reason for taking a distinction in this respect between a deserted wife and a widow.

The last Bombay case cited for the plaintiff was *Udárám Sitárám* v. *Sonkábái.*[1] The plaintiff Sonkábái, the widow of Náná *alias* Dhondu, sued her father-in-law, Udárám Sitárám, for a separate maintenance. He "pleaded that he was not liable, as no property belonging to his son had come into his hands." He did not allege that there was not any ancestral property in his hands, or that he was separate from his son in estate. The facts narrated in another case, in which he and Sonkábái were co-defendants, reported in 11 Bom. H. C. Rep., pp. 76, 78, show that neither of those allegations could have been made with truth, as Udárám Sitárám was in possession of some ancestral property, and his son was, at the time of his death, undivided from him. We observe, too, that Mr. Justice Nánábhái Haridás described the defendant as "the surviving member of the joint family, of which her (the plaintiff's) husband was a co-parcener," and partly rested his judgment on that fact.[2] The Courts below, which heard the maintenance suit, concurred in finding that Udárám had mal-treated his daughter-in-law, and expelled her from the family house. Those Courts awarded to her a residence in that house, and a separate maintenance of Rs. 10 *per mensem*, with two years' arrears. Having regard to her mal-treatment and her expulsion, and to the absence of either allegation or proof by the defendant that there was not any ancestral property in his hands available for her maintenance, or that his son was, at the time of his death, separate in estate from him, we should probably have concurred with the Division Court in its affirmance of the decrees of the

(1) 10 Bom. H. C. Rep. 483. (2) 10 Bom. H. C. Rep. 486.

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Courts below. In the absence of allegation or proof to the contrary, we think that we should have felt ourselves bound to assume the father and son to be undivided in estate, and on that assumption the widow of the latter would have been entitled, at the least, to have food, raiment, and residence provided for her by her father-in-law out of the ancestral estate in his hands; and, if he ill-treated her and expelled her from the family house, the civil Court would, we think, have been warranted in awarding to her a residence and a separate maintenance out of the family estate in his hands. But from some of the reasons given by the Division Court for its decision, and which reasons do not seem to have been actually necessary for the disposal of the case, we would express a respectful dissent, and we cannot regard such unsatisfactory cases as *Chandrábhágabái* v. *Kashináth*,[1] *Timmáppá* v. *Parmeshriámmá*,[2] and *Bâi Lakshmi* v. *Lakhmidás Gopaldás*,[3] which were there relied on by the Court, as affording any sufficient basis for those reasons. Our examination of the Hindu law has not led us to the conclusion that while it, "notwithstanding separation, leaves to the other members of the family an interest in the property of the separated member, to be realized on his widow's death," that law "conversely gives to him and to his widow a claim to maintenance, if, through destitution, they should come to need it." Nor have we discovered in that law any ground for supposing that an adult Hindu, separated in estate from his father[4] and uncles, can, if he fall into destitution, enforce a claim for maintenance either against any one or more of them personally, or against the residue of the family estate left in their hands after he has received his share on partition; or that his widow, even though destitute, can enforce such a claim on her own behalf after his decease.

We think that such of the above decisions as have favoured the claim of the widow, notwithstanding that the persons whom she sought to charge with her maintenance were separated in

(1) 2 Bom. H. C. Rep. 323.

(2) 5 Bom. H. C. Rep. 130, A. C. J. (3) 1 Bom. H. C. Rep. 13.

(4) *Vide Premchand Pepáráh* v. *Hulaschand Pepáráh*, 4 Beng. L. R. 23 Appx. S. C.; 12 Calc. W. R. 494. That case may have turned upon Bengal law. Where there has not been a partition, see *Ayyavu Muppanar* v. *Niládatchi Ammal*, 1 Mad. H. C. Rep. 45.

estate from her husband, or held neither ancestral estate nor estate which had belonged to him, do not stand, either in point of antiquity or of cited authority, so high as to place the doctrine there laid down beyond the review of a Full Bench of this Court.

It has been admitted, in the course of the argument, that there is not any instance known, either in the late Supreme Court of Bombay or at the Original Jurisdiction Side of this Court, in which a widow has obtained a decree for maintenance against the father, the brothers, nephews, or more remote kinsmen of her husband where there has not been family estate in their hands, or where they were separate in estate from her husband, and have not inherited property from him, as they might do if the widow were personally disqualified from taking it. We are not, however, to be understood as resting our decision upon any distinction between the law of maintenance in the island of Bombay and that of the Presidency at large. We see no good ground for making any such distinction.

We now proceed to examine the cases in the Sadr Adálat:—

In *Pránkoonwar and another* v. *Deokoonwar*,(1) a successful suit for residence and maintenance by a widow against her daughter-in-law and grandson, the family appeared to be undivided, and there was family property. In *Dái* v. *Purshotum*(2) the plaintiff's husband had been separated in estate from his nephew, and died, leaving the plaintiff, his widow, surviving: she, being blind, was held to be disqualified from inheriting from her husband, and his nephew was decreed to be entitled to take the estate, but, most properly, *cum onere* of maintaining the widow of him to whose property he thus succeeded.(3)

Sheo Bái v. *Gowreenund Huránund*(4) is an instance, not of a suit for maintenance, but of a widow claiming a share of the family estate and of being held bound by a partition which was made in the life-time of her husband between him and his brother and nephews whom she sued. She was held not to have any claim on the residue of the family estate.

(1) 1 Borr. 404 (2nd edn.) (2) *Ibid.* 453.

(3) Mitak., ch. II, sec. 10, pl. 12, 13, 14, 15: Mayukha, ch. IV, sec. 11, pl. 12; 3 Dig., bk. V, ch. 8, pl. 412, page 483 Comm.

(4) 2 Borr. 328 (2nd edn.)

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Upon a question put to the sástri in *Gun Joshi* v. *Sayoonà Bái*[1]—"Whether, after a widow had received a share of property as devised to her by will (*mhrit-patra*), she would be entitled to a further maintenance besides from her son"—the answer was that, "if the widow have received the share allotted to her in the *mhrit-patra*, the son is not obliged to provide her with food, raiment, &c. However, if a stipulation be made in the deed (will?), he must give it."

In *Thákoobái* v. *Rumábái*[2] a daughter-in-law (Rumábái) obtained maintenance from her mother-in-law (Thákoobái). There was not any allegation that the deceased husband (who was the adopted son of the mother-in-law) had separated from the latter. In fact, he appears to have died a minor and before consummation of his marriage.[3] The mother-in-law (Thákoobái) was in possession of the family estate. Subsequently, the daughter-in-law (Rumábái) having adopted a son for her deceased husband, which son recovered a moiety of the family property from Thákoobái (his adoptive grandmother), the burden of maintaining Rumábái was transferred to her adopted son.[4]

In *Jethee* v. *Sheo Bái*[5] the plaintiff sued for a share, but was held entitled to maintenance only. The family was undivided, and there was ancestral property.

Walubhrám v. *Bijlee*,[6] *Ládbái* v. *Amthá Shivábhái*,[7] and *Bujábá* v. *Anundee*[8] were all suits by the wife against the husband, and are, therefore, irrelevant.

Kumlá Buhoo v. *Muneeshankar*[9] deserves notice, as there the Sadr Adálat, in A.D. 1824, affirmed the decree of the Zillah Court at Surat, dissolving a contract of marriage between her infant daughter and another infant, entered into by the widow of one of two united brothers (without the sanction or knowledge of her deceased husband's brother, and after she had deserted the family

(1) 2 Borr. 440, at p. 446.
(2) *Ibid.* 488, 491.
(3) *Ibid.* 487, 489.
(4) *Ibid.* 485, 497, 498, 500 (2nd edn.)
(5) *Ibid.* 640, 642, 643, 644.
(6) *Ibid.* 481.
(7) 7 Harr. 166.
(8) 9 Harr. 383.
(9) 2 Borr. 746 (2nd edn.)

house and repaired to that of her own father, carrying away the daughter with her), and ordering that the widow should return to the family house and live there with her mother-in-law and brother-in-law, which latter was to maintain her. "Should they not agree to live together," he was directed "to give her some rooms in the family house for her accommodation, where she was to maintain herself at" his expense. That decree was made in conformity with the concurrent opinions of the sástris of the local Court and the Sadr Adálat. The brother-in-law was the plaintiff in that suit. The defendants were the widow and the father of the boy with whom the widow had, on behalf of her infant daughter, entered into the contract. The plaintiff was willing to maintain his sister-in-law, and prayed that she should be compelled to reside in the family house. In that case there was family property, and the brothers were undivided with respect to it at the time of the death of the husband of the defendant Kumlá, the widow.

Vishnu v. *Gangábái*[1] was a suit by a widow against her husband's younger brother in whose hands the family property was, and who was not shown to be separated from the plaintiff's husband; in which suit a money allowance was decreed to her as maintenance. It was held that she was not bound to reside with the defendant, and to accept of food and raiment only, and that, although an elder brother had not been made a party to the suit, it was duly constituted, inasmuch as he had been a wanderer for twenty-five years, and the whole of the family property was in the hands of the younger brother, and it was not shown that the elder brother was in any way liable. So far, therefore, as this case is concerned, it does not favour the liability of a separated member of the family not in possession of any of the family property.

It does not appear what was the relationship of the defendants to the husband of the widowed plaintiff in *Chimnábái* v. *Dádá and Govind*[2] in which maintenance was decreed. There was family property in their hands, viz., a *vatan;* and the suit was based upon an agreement. In *Soobámá* v. *Nánáráv*,[3] the case

(1) 1 Morr. S. D. A. 162. (2) 1 Morr. S. D. A. 85. (3) 2 Morr. S. D. A. 170.

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of a widow against her husband's nephew, the suit was brought upon a bond given to the widow to secure her allowance for maintenance.

In *Mánowá* v. *Ningápá*,[1] a widow sued three of her husband's brothers for maintenance, alleging that they had "the family *vatan* and the whole of her deceased husband's property." Ningápá, one of the defendants, alleged separation from his brothers thirty-five years previously. Chandápá, another defendant, pleaded that Mánowá, the plaintiff, had adopted one of his sons, and had agreed to live in his (Chandápá's) house, but afterwards quitted it, and therefore he was not bound to maintain her. So far as we can judge from the report, he neither alleged separation from the plaintiff's deceased husband, nor denied the possession of family property. Narsápá, the third defendant, did not appear or defend the suit. The case seems, so far as the report enables us to form an opinion, to have been unsatisfactorily dealt with in all three Courts. In none of them does there appear to have been any finding upon the question whether or not Ningápá's plea of separation from his deceased brother was true; yet, if it were true, it is clear that, at the very least, the unseparated brothers, holding any portion of the family property, would have been primarily liable to maintain the plaintiff.[2] There was, apparently, no denial on record, by Chandápá or Narsápá, of the plaintiff's allegation that they were in possession of family property, and no plea, by them, of separation from her husband. The Munsif, at the original hearing and again on re-trial (upon remand by the Assistant Judge), decreed in favour of the plaintiff apparently against all of the defendants. On a second regular appeal to the Assistant Judge, he reversed the decree of the Munsif, and dismissed the suit without prejudice to the plaintiff's bringing another, but duly constituted, suit against the proper parties. The main reason of this decree would appear to have been that, inasmuch as the plaintiff had not proved that another branch (not parties to the suit) of the same family as the three brothers of the deceased, which branch were at one time owners, with them, of the *vatan*, had been separated from them, the suit was defective

(1) 4 Morr. S. D. A. 56. (2) See *Vishnu* v. *Gangábái*, *supra*.

for want of the presence of that branch as parties. In his judgment the Assistant Judge did express an opinion that one field, at least, of the *vatan* property was in the possession of Ningápá; but he spoke *incertâ voce* as to Ningápá's possession of other family property, and was silent as to his separation in estate from his brothers. The Assistant Judge, also, after observing that he inferred from Chandápá's defence that he was willing to support the widow in his house, said that the widow had not proved that it was not her fault that she left it. Upon a special appeal to the Sadr Adálat, Mr. Larken, in admitting the appeal, said:—"It is urged that the persons who ought to be sued are her husband's brothers, and that, therefore, the special appellant in suing them has done all that she is called upon to do; and whether they have the family property or not, they are bound to maintain their brother's widow. It is also contended that good reasons were shown to justify the special appellant leaving Chandápá's house; and as I am of opinion that the Assistant Judge has decreed contrary to usage in disallowing maintenance for the reasons he has recorded, I refer the appeal for hearing by a Full Court." It is true that Mr. Larken here observed that it was argued that the brothers were bound to maintain the widow, whether or not they had family property,—a question which does not seem to have been raised in the lower Courts, or in the plaint, which, as we have seen, proceeded upon the ground that the three defendants had the family *vatan* and the whole of the property of her deceased husband; but, putting aside, for the present, the question whether brothers who have not got any family property or inherited aught from their deceased brother, are bound to make a pecuniary allowance to his widow who refuses to reside with them, it is clear that he, like the Assistant Judge, overlooked Ningápá's plea of separation, and failed to perceive that, if the other surviving brothers were undivided from the deceased and held family property, they, and not Ningápá, would be primarily liable to maintain the widow. The Full Court (Harrison, Hebbert, and Loughnan) appear to have abstained from giving any opinion on those questions. They reversed the Assistant Judge's decree, and remanded the cause for re-trial on the merits, as they found that there was "a manifest error in the Assistant Judge's decree, in his

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having held that, because there were other persons who might be jointly liable with the defendants for the plaintiff's maintenance, she could not recover in her present action against those she sued; whereas her claim against them should have been decided upon the merits in a just proportion to the liability established." It is unnecessary to express any opinion upon the validity of the ground upon which the Full Court decided that case, which ground is irrelevant here. Suffice it to say that (notwithstanding the *dictum* in *Rámchandra Dikshit* v. *Savitribái*[1]) we should take time to consider before following it as a precedent. The case, as decided, is, at all events, no authority for the soundness of the argument urged upon Mr. Larken (and towards which he would seem to have inclined on admitting the appeal) that the brothers, whether or not they had family property, were bound to maintain the widow. Neither Mr. Larken nor the Full Court referred to any authority in support of their respective opinions.

The decree for food and raiment (*unwustra*) obtained by Guzábái, the widow of Bájiráv, against Narsingráv, the elder brother of Bájiráv, appears to have been so obtained previously to Narsingráv's sale to Bhagvant of the family property mentioned in *Bhagvant Govind* v. *Guzábái*.[2] It does not appear that the brothers were separated in estate. We infer, too, that the sale which was there upheld against Guzábái must have been for the purpose of payment of family debts and therefore had precedence over the maintenance of herself and her mother-in-law.

In *Ahilábái* v. *Mohunji*[3] a widow obtained, against the undivided brother of her husband, a decree for maintenance. Although the defendant there denied the possession of any hereditary *vatan*, he appears to have admitted that there was other family property; inasmuch as he alleged that the widow had executed to him "a release of all claim upon the property belonging to her husband's family." The Court appears to have held that the defendant did not prove the execution of the release.

This completes our examination of all of the reported decisions of the Sadr Adálat on the question of maintenance, and leads us

(1) 4 Bom. H. C. Rep. 73, A. C. J. (2) 8 Harr. 120. (3) 9 Harr. 397.

to conclude that those decisions do not support the contention of the plaintiff, or the cases in 1 Bom. H. C. Rep. 13; 2 *Ibid.* 323, and 5 *Ibid.* 130, A.C.J.

We next purpose to enquire into the doctrine of maintenance as it appears in the Smritis and in the principal Hindu commentaries upon them, none of which have been cited in the three cases just mentioned.

We have no need, in this case, to decide positively upon the right to maintenance, under such circumstances as we have here, of a wife against her husband, or of a mother against her son. It is, however, incumbent upon us to notice, in the language of Manu and other Hindu jurists, an important distinction when, without reference to the existence of family property, they especially treat of the maintenance and support of the wife or of parents, or of an infant son, and when they speak of the maintenance and support of the females of the family at large. In the former cases their tone is mandatory, in the latter only preceptive. Amongst the texts relating to the wife or the parents are the following:—Manu, ch. VIII (On Judicature), placitum 389, "A mother, a father, a wife, and a son shall not be forsaken; he who forsakes either of them, unless guilty of a deadly sin, shall pay 600 *panas* to the king.(1) The meaning of the word "forsakes" is by another text of the same sage shown to be "does not maintain:" thus "Manu declared that a mother and a father in their old age, a virtuous wife and an infant son, must be maintained, even though doing a hundred times that which ought not to be done."(2) Narada(3) says:—"A husband who abandons an affectionate wife, or her who speaks not harshly, who is sensible, constant, and fruitful, shall be brought to his duty by the king with a severe chastisement;" and Vishnu(4):—"The man who deserts a faultless wife, *shall suffer the same punishment.*" And

(1) *Vide* per Norman, J., 2 Beng. L. R. 45, A. J.; 1 Morley's Di., Tit. Maintenance, pl. 38, p. 442.

(2) 3 Dig., bk. V, ch. VI, at end of sec. II, art. I, p. 400. And see Manu, chap. IX, pl. 74, 75, 98, 100, 108; 2 Macn. H. L., pp. 109, 110 (Cases 1, 2, 3) and pp. 113 to 115 (Case 6 and note).

(3) 2 Dig., bk. IV, ch. I, sec. 2, pl. 59, p. 413, and see pl. 63, page 415.

(4) 2 Dig., bk. IV, ch. I, sec. II, pl. 60, p. 414. See also per Devala, *Ibid.* pl. 61.

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Yajnyavalkya[1]:—"He who forsakes a wife, though obedient to his commands, diligent in household management, mother of an excellent son, and speaking kindly, shall be compelled to pay the third part of *his wealth*; *or*, *if* poor, to provide a maintenance for that wife." That text is adopted by Nilakantha in the Mayukha, ch. XX (On the duties of man and wife), pl. 1. Yajnyavalkya further says: "A superseded wife must be maintained, else a great offence is committed."[2] Vrihaspati says that the son, who gives not support to his mother, is "criminal, and shall be punished according to law."[3]

The injunction contained in these texts is not rendered dependent upon or in anywise qualified by a reference to the possession of family property, and purports to impose a personal legal obligation enforceable by the sovereign or the state. That obligation, too, is not asserted to be merely occasional, but permanent and continuous.[4]

Upon the text of Manu, secondly above cited, from 3 Digest, page 40 (bk. V, ch. VI, sec. II, art. I), Mr. Colebrooke, at the foot of that page, notes:—"The text is quoted in ch. VIII as inculcating the necessity of maintaining these relatives, even by the commission of offences: I have endeavoured to preserve the ambiguity of the original." The remark of Jagannatha, to which Mr. Colebrooke here refers, is at page 460 of the same volume, where the commentator discusses the text of Vrihaspati relating to the duties of a widow succeeding to the estate of her husband dying without leaving male issue, especially with regard to the maintenance of 'females of the family' (other than herself) and her husband's 'maternal uncles,' 'learned men,' 'unprotected persons,' and 'guests.' What Jagannatha there (3 Dig., bk. V, ch. VIII, pl. 399, p. 458) says is:—"It is not necessary that she should deprive herself of the means of subsistence to support the uncles and other relations of her husband; nor should she, for that purpose, do what is unauthorized by the law.

(1) 2 Dig., bk. IV, ch. I, sec. II, pl. 72, p. 420.

(2) 2 Dig., bk. IV, ch. I, sec. II, pl. 74, p. 421.

(3) 2 Dig., bk. IV, ch. I, sec. I, pl. 15, p. 386, and pl. 14, pp. 385, 386, per Manu.

(4) For other texts specially relating to the wife, see 2 Dig., bk. IV, ch. I, pl. 45, pp. 403, 404, pl. 116, p. 446; 3 Dig., bk. V, ch. V, pl. 340, p. 329; ch. IX, pl. 481, p. 581; Daya Bhaga, ch. IV, sec. I, pl. 25.

But her husband's father and mother, being old, must be maintained, even though the utmost distress ensue: for her husband was authorized by a text of Manu (ch. VI, sec. II, art. I) to use irregular means for the support of his father and mother and the rest." The virtuous wife and the infant son are 'the rest' here signified, as the text of Manu, referred to, shows; and, so far as they are concerned, that text would not be applicable in the case of the widow of a husband dying without leaving issue male taking the inheritance. To the text of Vrihaspati, in commenting on which Jagannatha incidentally made his remark (just quoted) on the text of Manu last mentioned, we shall presently have again occasion to advert.

Looking next to the texts which would include females of the family at large, and do not refer to the possession of family property, we find the following in Manu, ch. III[1]:—

"55. Married women must be honoured and adorned by their fathers and brethren, by their husbands, and by the brethren of their husbands, if they seek abundant prosperity."

"56. Where females are honoured, there the deities are pleased; but where they are dishonoured, there all religious acts become fruitless."

"57. Where female relations are made miserable, the family of him who makes them so very soon wholly perishes; but where they are not unhappy, the family always increases."

"58. On whatever houses the women of a family, not being duly honoured, pronounce an imprecation, those houses, with all that belong to them, utterly perish, as if destroyed by a sacrifice for the death of an enemy."

"59. Let these women, therefore, be continually supplied with ornaments, apparel, and food, at festivals and at jubilees, by men desirous of wealth."

"60. In whatever family the husband is contented with his wife and the wife with her husband, in this house will fortune be assuredly permanent."

(1) And see 2 Dig., bk. IV, ch. I, pl. 39, 40, 42, pp. 401, 402, and the extracts from the Mahabharata, *Ibid.* pl. 37, 38, 41, pp. 400, 401, 402.

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"61. Certainly, if the wife be not elegantly attired, she will not exhilarate her husband; and if her lord want hilarity, offspring will not be produced."

"62. A wife being gaily adorned, her whole house is embellished; but, if she be destitute of ornament, all will be deprived of decoration."

And in ch. XI we find:—

"7. He alone is worthy to drink the juice of the moon-plant who keeps a provision of grain sufficient to supply those whom the law commands him to nourish, for the term of three years or more."

"8. But a twice-born man, who keeps a less provision of grain, yet presumes to taste the juice of the moon-plant, shall gather no fruit from that sacrament, even though he taste it at the first, *or solemn, much less at any occasional*, ceremony."

"9. He who bestows gifts on strangers, *with a view to worldly fame*, while he suffers his family to live in distress, though he has power to support them, touches his lips with honey, but swallows poison; such virtue is counterfeit."

"10. Even what he does for the sake of his future spiritual body, to the injury of those whom he is bound to maintain, shall bring him ultimate misery both in this life and in the next."

And in 2 Digest, bk. II, ch. IV, pl. xi, p. 112, is this text from Manu: "The ample support of those who are entitled to maintenance is rewarded with *bliss in* heaven; but hell is the portion of that man whose family is afflicted with pain by his neglect: therefore, let him maintain his family with the utmost care."

And in the same volume (bk. IV, ch. I, sec. II, pl. 43, pp. 402, 403) are the following from Yajnyavalkya:—"Females must be honoured by their husbands, brothers, fathers, and paternal kinsmen; by the fathers, mothers, and brethren of their husbands; and by *all* kinsmen; with gifts of ornaments, apparel and food;" and pl. xliv—"By not gratifying the longings of a pregnant woman, the embryo suffers injury, becomes deformed, or even perishes; therefore, should women be treated with affection."

The incentives held out to obedience in these texts are prosperity, offspring, and happiness in this life, and the consequences of disobedience are stated to be extinction of family and misery in this world and in the next. Compulsion of a civil or penal character is not prescribed as proper to be exercised by the sovereign or the state. Although the word 'continually' is used in pl. 59, ch. 3, of Manu, above extracted, it is followed by the words "at festivals and jubilees," which afford an inference that he here enjoined the display of hospitality and generosity to the females of the family on special occasions, and as a moral duty, rather than treated of a permanent provision for their clothing and support as a legal obligation. "Ornaments" placed in pl. 59 in the same category with "food and apparel," elegant attirement in pl. 61, and gay adornment in pl. 62, all tend to the like conclusion. Commenting on these texts (43 and 44) of Yajnyavalkya and pl. 56, 57, 58, 59, 60, ch. 3, in Manu, and those in 2 Dig., p. 402, already mentioned, Jagannatha (2 Dig., bk. IV, ch. I, sec. II, pl. 44, Comm. p. 403) says:—"From what has been stated, it appears that reverence must necessarily be shown to a wife, sister, and the rest, by gifts of food and clothes, and of ornaments, bestowed according to his ability by her husband, her brother, or some wealthy relation, as the case may be: this is a settled rule. If it be not done, the omission is punished with misfortune, for texts[1] show that the family perishes: therefore, women shall not, *in such cases*, apply to the king; but he being privately informed, must compel their relations to supply them with food and the like; and the rule must be settled as in the supplementary chapter *of the code of law*." The meaning of this prohibition of an application by women to the king and relegation of the matter to his private action is not very clear. It probably may be that the commentator did not regard the women of the family at large as at liberty to resort to Courts of Justice in the case of claims to maintenance irrespective of family property. Other portions of his work favour the supposition that his opinion was that, in certain cases at least, the injunction of the Rishis as to the supply of food and clothes of the women of the family at large, when

[1] Manu, ch. III, pl. 57, 58, ch. IX, pl. 202, ch. XI, pl. 7 to 10; 2 Dig., bk. II, ch. IV, pl. 18, cl. I; bk. IV, ch. II, pl. 38, cl. 1 and 2, pl. 39, cl. 2, 3.

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there was no property belonging to the united family, or to the deceased person whose widow needed support, in the possession of the members of the family sought to be charged, is of ethical rather than of legal obligation. For instance, in 2 Dig., bk. II, ch. IV, pl. 18, cl. 1, p. 131, where, in discussing alienable property, he quotes Vrihaspati thus:—"A man may give what remains after the food and clothing of his family; the giver of more, who leaves his family naked and unfed, may taste honey at first, but shall afterwards find it poison."(1) Here no civil obligation is prescribed, but merely a moral duty; and, further, in cl. 3 of the same placitum, Jagannatha gives this extract from the same Smriti writer:—"At his pleasure he may give what himself acquired, &c." Vrihaspati thus asserting that the head of the family had complete control over his personal acquisitions, and so restricting what he had said in clause 1 to family property. And, subsequently, in 3 Dig., bk. V (on Inheritance), ch. II (On Distribution by a father in his life-time), page 1, Jagannatha says that a father "may distribute, at his pleasure, immoveable and other property acquired by himself." At page 2 he continues thus:—"A father has dominion over property acquired by himself; should he give no share to any one son, though guilty of no offence, and give a share to one guilty of offences, who shall punish him? It cannot be affirmed that, under the authority of the texts cited from Katyayana and Baudhayana, the king may punish such a father. The law propounds the moral offence committed by a father slighting such precepts, but ordains no fine; like the giver of gold to an improper object, *thereby committing an offence, but incurring no civil penalty.*" And at the foot of page 31 he says:—"When partition of property, which he himself acquired, is made by a father, the share of his wife and the rest seems to be incidentally discussed. A father may divide, at his pleasure, property which he himself acquired, *giving more to some and less to others;* or he may give the first-born the portion of an eldest son; or make all the shares equal." These passages, it may, no doubt, be said, refer to partition; but, on reverting to the foot of page 4 of the same volume, we find that their applicability to maintenance also becomes apparent, for Jagannatha there says:

(1) See also Manu, ch. XI, pl. 9.

"Equal partition may be *considered as* preceptive, like the maintenance of the family out of a man's own wealth. Thus, the support of a married daughter residing in her father's house (for so the term is explained by Vijnyanesvara) is approved by Yajnyavalkya (LXXVII), although she have no title to the estate; and there is no difference, so far as proof of property is concerned, between the enjoyment *of a maintenance* and the receipt of a share." The text of Yajnyavalkya, to which he refers, is that which follows the last above-quoted remark of Jagannatha, and is:—"After assigning a sufficient support to infants, to a married daughter residing in the house of her father, to aged persons, pregnant women, persons afflicted with disease, damsels *yet unmarried*, guests and servants, the husband and wife may enjoy the residue."(1) The inclusion of guests and servants indicates that Yajnyavalkya was in that text speaking in a directory and not a mandatory sense.(2)

Of the text of Vrihaspati, already mentioned,(3) in which are recorded the duties of the widow who has inherited the estate of a husband dying without issue male, the 6th clause is: "With food consecrated to the gods and the manes, let her honour paternal uncles, spiritual parents, daughters' sons, the offspring of her husband's sisters and his maternal uncles, learned men, unprotected persons, guests and females of the family." Here we have an extraordinary assortment of persons. Jagannatha explains(4) that "learned men" is an expression signifying persons versed in science;—that "females of the family" are "the widows of her husband's sons and the rest;"—that "daughters of the husband's sisters, if destitute of protectors, are included under the expression 'unprotected persons,'" and that "the support of them is only necessary if they be so circumstanced. Consequently, all this should, if possible, be done at the charge of her husband's estate; otherwise (*if the funds be inadequate*) it must be done in words only." He then proceeds with his commentary, in the manner already above quoted, as to it not being necessary to deprive herself of the means of subsistence in order to support the uncles

(1) 3 Dig., bk. V, ch. II, pl. 77, p. 5.
(2) See also 3 Dig., bk. V, ch. VIII, pl. 399, cl. 6, p. 458.
(3) 3 Dig., bk. V, ch. VIII, pl. 399, p. 458.
(4) 3 Dig., bk. V, ch. VIII, pl. 399, p. 460.

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and other relatives of her husband, excepting his father and mother whom when old she must support, even though the utmost distress ensue. After referring to the practice in certain Brahmanical and noble families as to maintenance of daughters-in-law and granddaughters, which practice is "not found in codes of law," and saying that it is not absolutely incumbent on the widow to support Brahmans resident in the same town, he proceeds thus:—"Others deduce from the expression 'honour with food consecrated to the gods and manes,' that pious offerings are alone positively directed; hence occasional presents of food and apparel and the like are suggested, not a *settled* maintenance;(1) and this is reasonable, for sages have not, by anticipation, composed books in conformity with the present practice."(2) Speaking as he does thus in the supposed case of a widow who has inherited property from her husband, it is not an unfair inference to make that he would have deemed it highly unreasonable to countenance claims for maintenance made against a relative separated from the family or without family property, by persons other than his parents (when old or in distress), his wife, or his infant son, or possibly, by analogy to the latter, unmarried daughters.

In the present case, where the defendants do not hold any family property, we cannot regard the claim of the plaintiff as supported by texts, which, although they may enjoin maintenance, do so in express connexion with the inheritance of property and the liabilities of or charges upon that property in the hands of the heir. Such texts are numerous: for instance, that from Vrihaspati last quoted; those of Yajnyavalkya at page 46 of Roer and Montriou's Translation, pl. 140, 141, 142; those of Narada, rendered thus by Dr. Jolly(3):—

"25. Amongst brothers, if any one die without issue, or enter a religious order, let the rest of the brothers divide his wealth, except the wife's separate property."

"26. Let them allow a maintenance to his women for life, provided these preserve unsullied the bed of their lord. But if they behave otherwise, the brethren may resume that allowance."

(1) Acc. Daya Bhaga, ch. XI, sec. I, pl. 63.
(2) 3 Dig., bk. V, ch. VIII, pl. 399, p. 461.
(3) Narada XIII, pl. 25, 26, 27, 28; Dr. Jolly's Trans., pp. 97, 98; 3 Dig., bk. V, ch. VIII, pl. 305, p. 474; 1 West and Bühler, p. 355, pl. 25, 26, 27, 28.

"27. As regards the daughter of a deceased co-parcener, her maintenance shall be made out of her father's share; let them support her until her marriage; afterwards her husband shall keep her."

"28. After the death of the husband, his kin are the guardians of a childless widow; in disposing of her, and in the case of her, as well in her maintenance, they have full power."

And there is another text of Narada which shows that the wives of a deceased proprietor are entitled to maintenance out of his property, when, for want of nearer heirs, it escheats to the king.(1) The next text is that of Sancha:—"To the childless wives of brothers and of sons, strictly observing the conduct prescribed, their spiritual parent must allot mere food and old garments which are not tattered."(2) Upon this the Commentary of Jagannatha is: "But some add, by way of supplement to the opinion of Chandesvara, that food and apparel must be given, under the text of Sancha, to the childless widow of a son or brother by her father-in-law, her brother-in-law and the rest who take the estate of her deceased lord, and such nearly is the practice as observed by certain persons. Thus, he who takes the estate of another, must give food to his widow and the rest, whether she be daughter-in-law or sister-in-law *of the heir*. If he cannot supply her maintenance, he must not take the estate of the deceased so long as a widow survive. But the allotment of food and raiment to both these widows is not always indispensable; for they are not enumerated in the text of Manu among persons who must be maintained at all events. However, they should, if possible, be supported; for since Vrihaspati, treating of the succession of widows (3 Dig., bk. V, ch. VIII, pl. 399), directs that she who is first, by the text of Manu, in the order of succession to the estate of him who leaves no male issue, shall honour learned and unprotected persons and the rest, the same ought likewise to be established in the case of another heir." Assum-

(1) Narada XIII, pl. 51, 52; 3 Dig., bk. V, ch. VIII, pl. 448, p. 540; Dr. Jolly, p. 101; 1 West and Bühler 358; Mitak., ch. II, sec. I, pl. 27, 28; Mayukha, ch. IV, sec. 8, pl. 5; *Mussamut Golab* v. *The Collector of Benares*, 4 Moo. Ind. Ap. 246.

(2) 3 Dig., bk. V, ch. VIII, pl. 412, pp. 482, 483; Mayukha, ch. IV, sec. IX, pl. 22.

(3) These persons are the father, mother, virtuous wife, and infant son, 3 Dig., p. 406, bk. V, ch. VI, sec. II, art. I (at the end).

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ing the text of Harita (3 Dig., bk. V, ch. VIII, pl. 409, p. 479) to apply to maintenance[1] it is too vague to be of much value. It neither states the person nor the property liable to give the maintenance. In ch. IV, sec. VIII, pl. 2 and 9 of the Mayukha, that text is referred to as entitling a woman suspected of incontinence to a maintenance; but the section of the Mayukha, which contains those placita, treats of obstructed heritage; and the author is there clearly dealing with the inheritance and its liabilities, amongst the latter of which is, under certain circumstances, maintenance. The same text of Harita is noticed in the Mitakshara, ch. II, sec. I, pl. 37, as a denial of the right of a widow suspected of incontinency to take the whole estate, and, therefore, as implying that a widow not suspected of incontinency has a right to take the whole property of a husband separated from his family and dying without leaving issue male. Vijnyanesvara is there regarding such maintenance of a headstrong woman as one of the liabilities of the inheritance, the descent of which was his main topic.

The treatises of Hindu law of chief authority in this Presidency are, as has often been stated in this Court, Manu, the Mitakshara, and the Mayukha. Of these we have already mentioned and commented upon Manu. We now proceed to advert to the texts in the two other works.

In the Mitakshara, the injunction to maintenance when given will be found to be so with reference to the succession to or exclusion from the succession to the family property. Thus in ch. I, sec. I, pl. 27, Vijnyanesvara is laying down the proposition that the right of property in ancestral immoveable estate is by birth, and incidentally to that doctrine quotes the ordinance of Vyasa to show that sons may prevent the father from alienating immoveable estate :—" Though immoveables or bipeds have been acquired by a man himself, a gift or sale of them should not be made without convening all the sons. They who are born, and they who are yet unbegotten, and they who are still in the womb,

[1] It will be observed that this passage is by Mr. Colebrooke in 3 Dig., p. 479, rendered somewhat differently from the versions of it given in the Mayukha and Mitakshara. In the Digest the word 'maintenance' is not used, but "separate property."

equire the means of support; no gift or sale should, therefore, be made." In ch. I, sec. II, pl. 8, 9, 10, the same author is dealing with the wife's share in the family property on a partition in her husband's life-time.(1) Section VII is conversant of the shares of widows and unmarried daughters in the same property on a separation after the death of the husband of the widow. This right of the wife or widow to a share in the case of undivided estate is in the nature rather of maintenance than of co-parcenery in the ordinary sense of that term—2 Stran. H. L., 295, 305, 307 per Mr. Ellis—and see the observations of West, J., in *Lakshman Rámchandra* v. *Satyábhámabai*.(2) Section XI, pl. 25, 26, in the case of the *aurasa* son taking the family inheritance, confers upon inferior sons the right to food and raiment out of it. Section XII, while denying to the son of a man of a regenerate tribe by a female slave the right of a co-parcener in the family estate, admits that if he be docile he is entitled to simple maintenance out of it. Ch. II (*On the right of the widow to inherit the estate of one dying separated*(3) *and leaving no issue*), sec. I, pl. 7, in referring to texts of the Rishis supposed to be adverse to the widow's claim to inherit, mentions the texts of Narada(4) last above quoted and already disposed of. Pl. 10, 12, and 13 also point to the maintenance of the widow out of the estate when it descends upon her son raised up to her deceased husband by his brother. Pl. 30 (and see Balambhat's note to sec. IX, pl. 4) applies to her maintenance out of the estate where there has been reunion of the parceners, and pl. 21 to maintenance out of the estate of the wives of persons excluded by personal disqualification from inheriting that estate. Pl. 27 and 28 quote a text of Katyayana (in accordance with Narada XIII, pl. 51, 52 above referred to) imposing on property escheating to the sovereign the liability to maintain the females of the family (including concubines) of the deceased proprietor.(5)

(1) In the last line of pl. 8 the words "like portions" are in Mr. Stokes' reprint of the Mitakshara misprinted 'life portions.'

(2) *Supra*, p. 494; see, also, Dáya Krama Sangraha, ch. II, sec. II, pl. 35.

(3) See sec. I, pl. 30, 39. (4) Narada XIII, pl. 25, 26, 27, 28.

(5) The widow is entitled to maintenance out of the ancestral property formerly of her husband, but forfeited for his treason to the Crown; *Mussamut Golab* v. *The Collector of Benares*, 4 Moo. Ind. Ap. 246.

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The subject of maintenance is further mentioned in pl. 31, 32, 33, 35, 37, but is so in these (as well as the other placita of the same section which have been named), for the mere purpose of showing that the texts of the Rishis, awarding maintenance, do not militate against the right of the wife of one dying separated from his brethren, and without leaving issue male, from succeeding to his property as heir. Section X (of the same chapter), which relates to exclusion from inheritance, by its 1st and 5th placita, states that persons excluded from inheritance owing to some personal defect, such as blindness, deafness, dumbness, idiocy, &c., shall be maintained, and pl. 12, 13, 14, and 15 declare that the unmarried daughters and wives of such persons shall also be maintained. The duty of so maintaining them falls upon the persons who succeed to the estate from which those first mentioned are excluded. This concludes the examination of the Mitakshara. We find nothing in it to support the case of the plaintiff.

Turning now to the passages in the Mayukha on the subject of maintenance, it appears that in ch. IV, sec. IV, pl. 18,[1] 19,[2] on a division of the estate by the heirs after the death of a father, a share, that is to say, maintenance is contemplated for the wives and mother of the deceased and also for his stepmother, and in pl. 30 for certain illegitimate sons. Placitum 15 relates to the shares of wives on a partition in the father's life-time. In referring to a text of Harita we have already mentioned placita 2 and 9 in sec. VIII of the same chapter. Placitum 5 of that section relates to the liability of property, which has escheated to the king, to maintenance for females of the family of the late owner. Placitum 6 (quoting the text of Narada (XIII, 25, 26) which declares the women of the deceased proprietor entitled on a partition to maintenance upon the death, civil or natural, of one of several brothers) says that it relates to the case of a man dying unseparated or reunited. Placitum 7 of this section is especially important as being the only passage in which the father-in-law is expressly named as an allotter of maintenance. It commences by quoting this text from Katyayana: 'But if her husband have departed for heaven, the wife obtains food and raiment: or (too), if unseparated, she will receive a share of the wealth so long as she lives. Nilakantha

(1) Quoting Yajnavalkya. (2) Quoting Vyasa.

explains the term 'unseparated' as including also a reunited family. He also treats the first branch of the text as referring to a wife lawfully married, and the second branch to a concubine (a woman set apart).[1] In further explanation of the same text, he quotes another text of Katyayana:—'She, who is intent upon her service to her venerable Guru, is fit to enjoy the share assigned: should she not perform her proper duty, he shall order her (only) clothes (already worn) and a morsel of food.' Nilakantha's gloss on the phrase '*Guru*' is: "*Her Guru*, her father-in-law, and other (venerable relatives). At his pleasure she may receive a share; otherwise merely food and raiment. This is the meaning." It must be recollected, first, that this passage (pl. 7) occurs in a section devoted to the subject of obstructed heritage or succession; 2ndly, that it is in immediate sequence to pl. 5 quoting from Narada as to the liability of the inheritance in the hands of the king to the maintenance of the females of the family, and pl. 6 also quoting Narada as to providing maintenance for them, when chaste, upon a partition of the family wealth amongst the brethren; 3rdly, that pl. 7 itself opens with a text of Katyayana conversant of the wealth of the deceased proprietor; and, lastly, that the word 'unseparated' is employed, which must mean unseparated by reason of her husband being unseparated from his brethren or kinsfolk. Hence, it may be inferred that if her husband were divided in estate from his father, the wife of the former would have no claim upon the estate of the latter. The whole of pl. 7 seems to us to relate to the liability of the property to yield to her a share or maintenance, and not to any claim by a woman against her father-in-law personally. And pl. 8 expressly limits to a living husband the direction, contained in the text secondly there quoted, to furnish clothes and grain to a female degraded by misconduct. The main subject of section VIII is the succession to the estate of a Hindu who has died without leaving issue male, and not the maintenance of women; but that subject is treated incidentally in so far as it affects the estate. Section IX of ch. IV is a discourse upon reunion after partition. Its 22nd placitum referring

(1) See *Khemkor* v. *Umiáshankar*, 10 Bom. H. C. Rep. 381; *Vrandávandás* v. *Yamunábdi*, 12 *Ibid.* 229; and *Ráhi* v. *Govind Teja*, Ind. L. B. 1 Bom. 79.

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to passages already quoted by us from Sancha[1] and Narada[2] lays down that the reunited brethren divide the estate, and that maintenance only is reserved for the widow and daughter of the deceased. Section X, pl. 10, discusses the power of a woman over her own property, including what is allotted to her for subsistence; and pl. 11 asserts her right to insist upon its restoration, if withheld from her by her husband. By sec. XI (*On exclusion from inheritance*), pl. 1, 3, 7, 9, maintenance is prescribed for persons disqualified for succession as heirs by certain mental or physical personal defects or by illegitimacy. Of these texts pl. 9 is as follows:—"But all those excluded from participation must be maintained, during the rest of their lives, by those who get the estate, from this text of Manu, 'But it is fit that a wise man should give all of them food and raiment, without stint, to the best of his power: for he who gives it not shall be deemed an outcast'—(*Without stint* signifies 'as long as they live,')—as well as from the foregoing one of Yajnyavalkya (para. 1) 'those excluded from inheritance' must still be maintained."[3] The text of Manu, there referred to by Nilakantha, runs in the original, as translated by Sir William Jones, thus:—"But it is just that the heir, who knows his duty, should give all of them food and raiment *for life* without stint, according to the best of his power: he who gives them nothing sinks assuredly *to a region of punishment.*"[4] The word "heir" shows that this duty is cast by Manu upon the person who takes the inheritance. Continuing the Mayukha, ch. IV, sec. XI, we find that pl. 12 lays down the like rule of maintenance for wives and unmarried daughters of disqualified persons, and for this doctrine quotes the text of Yajnyavalkya, relied upon in the Mitakshara, for the same purpose.[5] Chapter IX (pl. 2, 3, 4, 5) prohibits and treats as penal the alienation of property until the maintenance of the family is provided for. But the extent of "the family" is not there defined; the text attributed

(1) 3 Dig., bk. V, ch. VIII, sec. I, pl. 412, page 482.

(2) Narada, XIII, pl. 25, 26, 27; 3 Dig., bk. V, ch. VIII, sec. I, pl. 405, page 474.

(3) 3 Dig., bk. V, ch. V, pl. 331, p. 321.

(4) Manu, ch. IX, pl. 202; 3 Dig., bk. V, ch. V, pl. 329, cl. 2, p. 318; *et vide ibid.*, pl. 320, cl. 2, pl. 321, cl. 2, pp. 303, 304, quoting texts of Narada and Devala.

(5) Mitak., ch. II, sec. X, pl. 1, 5, 12, 13, 14, 15.

to Vyasa in pl. 5 (but in 2 Dig., bk. II, ch. IV, sec. I, pl. 12, to Narada,[1]) only points to the issue of the owner. Chapter IX, too, treats of subtraction of gift and not of the personal liability of the male members of a family to furnish maintenance. Chapter XX, sec. I, has been already mentioned as prescribing, independently of the possession of wealth, the necessity of the maintenance of *the wife by her husband.* This examination of the Mayukha lends no support to a widow seeking a pecuniary allowance by way of maintenance from the separated brother of her husband, whether possessed or unpossessed of family estate.

The passages in the Daya Bhaga relating to maintenance are ch. II, pl. 23 (prohibiting total alienation of immoveable property as being essential for the maintenance of the family); ch. III, sec. II, pl. 29, *et. seq.;* ch. V, pl. 10, 11, 12, 16, 19; ch. IX, pl. 28; ch. XI, sec. I, pl. 48, 49, and 52. All of these are connected with property or the succession to or partition thereof and its liabilities in the hands of the heir. So are the passages in Datt. Chand, sec. VI, pl. 15; sec. I, pl. 1, 2; in the Daya-Krama-Sangraha, ch. II, pl. 16, 26, 35; and ch. VII, pl. 3, and in the Vivada Chintamani, pp. 75, 243 to 245, 285, 286, 291.[2]

In the Smriti Chandrika, ch. XI, sec. 1, pl. 34, it is laid down that "when the father-in-law and the like are qualified to maintain the widow and take themselves the property of the deceased undivided member of the family, they alone are to maintain the widow from the property so taken. Accordingly, Narada says:—'Whichever wife (patni) becomes a widow and continues virtuous, she is entitled to be provided with food and raiment by the elder brother of the deceased, or by her father-in-law, or by a gotraja or any other person.' In order to maintain the widow, the elder brother, or any of the others above mentioned, must have taken the property of the deceased; the duty of maintaining the widow being dependent on taking the property." Devanda Bhatta, the author of the Smriti Chandrika, had previously in ch. V, pl. 25, when treating of kinsmen excluded from inherit-

(1) See, however, Dr. Jolly's Narada, Pt. II, ch. IV, pl. 6, page 60. And, as to the effect of separation, see the same work, Pt. II, ch. XIII, pl. 37, 38, 42, and, especially as to the right of alienation, pl. 43.

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ance by reason of their personal infirmities, in relation to the texts of Manu and of Yajnyavalkya ordaining that to such persons "food and raiment without stint" shall be supplied by their kinsmen, said:—"24.—The meaning is, that Manu and others consider that food and raiment are to be supplied to him, who is excluded from inheritance, by those who take his father's wealth. The meaning of the last sentence[1] of the text is, that when kinsmen have not taken the estate of the father of one excluded from inheritance, they are not to be compelled by the king to pay him maintenance. 25.—The rule hence settled is, that it is not necessary for kinsmen, who have not taken the patrimony of one excluded from inheritance, to maintain such person." And, as to the unmarried (while so continuing) daughters and the wives of persons so excluded, the same author observes that they "are to be maintained by those who take the estate of the disqualified persons in the same manner as the disqualified persons themselves are maintained."[2]

In 1 Stra. H. L., p. 172, it is, however, said: "Where her husband's property proves deficient, the duty of providing for her is cast upon his relations, and, failing them, upon her own,—an obligation that attaches, though she should have wasted what was assigned to her for that purpose; giving colour to the law, requiring her to live with them that they may watch and control her conduct." Even assuming the authorities cited by the learned author for that doctrine to support it, he does not there countenance a claim for a pecuniary allowance to a widow so circumstanced, and (without the excuse of ill-treatment by her husband's relatives, who are willing to receive and support her) voluntarily residing apart from them. The authorities to which he refers are Mitakshara on Inheritance, ch. II, sec. I, pl. 7, 37, and sec. X, pl. 14, 15; Jim. Vah. (Daya Bhaga), ch. V, pl. 19; 3 Dig. 324, 479 (all of which we have already mentioned), and page 247 of the first volume of his own work (which seems to be a mistake for p. 244), apparently referred to chiefly for the purpose of showing the obligation imposed upon the widow to reside with the sons of her

(1) "The kinsmen shall not be compelled to give the wealth received by them not being his patrimony," Katyayana, Sm. Chand., ch. V, pl. 23.

(2) Ch. V, pl. 43.

husband, if any, and if not, with his other relatives. In none of the texts in the Mitakshara, the Daya Bhaga, or the Digest, referred to by Sir T. Strange, is it stated that, if the widow have wasted what has been assigned to her for maintenance, she is again entitled to resort either to the family estate or her relatives for a further assignment of that nature. Nor is there in those texts a single word as to the husband's property proving deficient. In fact, Vijnyanesvara, in ch. II, sec. I of the Mitakshara on Inheritance, was not discussing the question of maintenance, but the right of the widow of one separated from his brethren and dying without leaving issue male to succeed as heir to his estate, and in pl. 7 and 37 (relied on by Sir T. Strange for his propositions) mentioned certain texts of Narada[1] and Harita[2] relating to maintenance, not so much for the purpose of inculcating the duty of maintenance, but with the object of explaining that those texts could not prevent a virtuous widow so circumstanced from taking the estate of her husband as his heir. Placita 14 and 15 of sec. X, of the same chapter, also relied upon by Sir T. Strange, do not apply to the widow of a man whose estate proves to be deficient, but to the widows of persons altogether excluded from inheritance by reason of personal disqualification. In so far as Vijnyanesvara in that chapter treats of maintenance, he regards it as a liability of the estate in the hands of whomsoever may be the heir[3] and not as a personal liability. So, too, ch. V of the Daya Bhaga is conversant of exclusion from inheritance on the ground of personal defect or illegitimacy; and its 19th placitum, relied on by Sir T. Strange, provides, as the context shows, that the unmarried daughters and wives of such persons shall be mainained by the heir out of the estate, as is manifest on a perusal of he whole chapter. The texts of Narada and Harita, mentioned in the passages of the Mitakshara and that of Yajnavalkya quoted in the passage of the Daya Bhaga and also given in 3 Dig., p. 324, relied on by Sir T. Strange, as well as that of Harita, in 3 Dig. 479, also relied on by him, have been already fully discussed.

(1) Narada, XIII, pl. 25, 26, 27. Jolly's Trans., pp. 97, 98; 3 Dig., bk. V, ch. VIII, sec. I, pl. 405, page 474.

(2) 3 Dig., bk. V, ch. VIII, sec. I, pl. 409, page 479.

(3) Mitak., ch. II, sec. I, pl. 7, 10, 27 28, 35, 38.

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The cases contained in the 2nd volume of Sir T. Strange's treatise, and relating to the maintenance of widows, do not support the propositions in the 1st volume, p. 172, which we have ventured to question. These cases extend from p. 290 to p. 310 of the 2nd volume. In all of them there appears to have been family estates in the hands of the person compelled to maintain the widow. In one of those cases, at p. 291, the pundit is represented as saying that "if there be undivided brothers, and one die, leaving a widow and son, they succeed to his share of the joint property." Mr. Colebrooke's remark upon this is missing, but that of Mr. Ellis is forthcoming and valuable. He said:—"As long as the family continues undivided, all the parceners, their wives and families, are entitled to a joint maintenance; on division, widows, wives, and children can claim only on the portion of their respective husbands and fathers. In the present case, if the son were alive at the time of division, his mother would have to look to him alone for maintenance; if he were dead, she could be entitled, in right at once both of her husband and son, to succeed to a full share of the estate,—that is to say, a full share should be the *maximum* allowed her." At page 309 of 2 Strange H. L. similar questions arose in the case of *Vencummy* v. *Govindoo Chitty*. The case, as submitted to the Court pundit, was this:—"The plaintiff's husband, deceased, and the defendants were undivided brothers. The deceased having left a son by the plaintiff, aged four years, she demands a share out of the common estate for herself, and another for her child. To her claim, as regards herself, is opposed—1, the general Law of Inheritance and Partition; 2, her conduct, to which adultery is imputed. Under these circumstances what are her rights?" The pundit's answer was: "There is no ground for the claim of separate shares for herself and her son. *The share that is given to the son, must maintain his mother.* Though she should not conduct herself to the entire satisfaction of her caste people, still she must be subsisted out of the share allotted to her son, who in the meantime is to continue under her care till he attain his age; nor, though she should prove an adulteress, can he refuse to supply her with the necessaries of life." Mr. Colebrooke's comment, so far as here relevant, was: "The son is entitled to the share of his father who was one of

four brothers (Mitak. On Inh., ch. I, sec. V, pl. 2), *and his mother must be maintained out of his allotment.*" The remark of Mr. Ellis, so far as relevant, on the pundit's opinion, was: "Correct as to the exclusive right and consequent obligation of the son."

The dissertation in Macnaghten's Hindu Law, vol. I, pp. 47, 48, and 49, as to the share of a wife on partition, does not, so far as it goes, favour her right to resort, after partition, to ancestral property in the hands of a separated kinsman of her husband. And in Case IV, at page 111 of vol. 2, Macnaghten's Hindu law, which was a suit by a daughter-in-law (a widow) against her mother-in-law (a widow in possession of the family property), the right of the daughter-in-law to alimony was negatived, and her residence with her mother-in-law pronounced to be obligatory as the condition of her obtaining food and raiment. Again, in *Kumalmáni Dási* v. *Bodhnarain Mujmooadar and another*, reported as Case XI in the same volume, pp. 118, 119, it was held that a widow, whose husband had separated from his father and full brother, and had obtained his share of the ancestral estate, could not sustain a suit for maintenance against her father-in-law and brother-in-law.

In all of the other cases as to widow's maintenance in the same volume, extending from p. 111 to p. 117, there would seem to have been family property available to meet her claim.

Mr. Strange in his Manual of Hindu Law (2nd edn.), p. 54, pl. 209, says: "Where there may be no property but what has been self-acquired, the only parties whose maintenance out of such property is imperative, are aged parents, wife, and minor children." For this he refers to the Mitakshara on the subtraction of gift.[1]

In pl. 210 he continues: "Thus, where there is no ancestral property, a widow is not entitled to look for maintenance from her husband's brother." For this he vouches a judgment in sp. app. 142 of 1859 of the Madras Sadr Adálat. See also William's Digest of Madras Decisions, p. 22, pl. 7.

In 1 Morley's Dig. N. S., Tit. Maintenance, p. 249, pl. 5, there is a note of a Madras case in which a widow sued her husband's brothers for a money allowance as maintenance, but failed to

[1] See ch. X, fol. 69, p. 1, l. 1.

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prove that they were in possession of any ancestral estate, or, as I infer from the note, any property of her late husband. The Court held that she was not entitled to a money allowance from them, and that they could only be required to support her if she resided with them. It does not appear whether her husband was separated from them; but, in the absence of evidence that he was so, the presumption would be otherwise.

The late Mr. Justice Norman, when acting as Chief Justice of Bengal, held that a widow could not support a suit for a money allowance as maintenance against her father-in-law, who had separated in estate, though not in food and worship, from his son, her husband, in the life-time of the latter—*Rájjomoney Dossee* v. *Shibchunder Mullick*.(1) Her father-in-law was, as the defendants here were, willing to maintain her in his house; but she, who was very young, left his house, alleging that two of the females of his family ill-treated her. Her chief cause for leaving, she said, was that she had only one meal a day, that she wanted *pán*, but got none, and that widows of her caste ate *pán*. Norman, C.J., however, held that no real cruelty had been proved, and said:—"According to Hindu law, probably the plaintiff should be maintained in the house of her father-in-law, who ought to find her in food and raiment. But when the father and son are not joint in estate, the maintenance of the son's widow appears to be a mere moral duty in her father-in-law to the performance of which he is not compellable by law." After referring to the absolute power of a Hindu over his self-acquired property, and, on that point, to Colebrooke's Digest, vol. 2, bk. V, ch. I, pl. xxiii, xxiv, xxv, and xxvi, relating to the distribution, by a father, of self-acquired estate and to ch. II of the same book (vol. III), already cited, where Jagannatha treats the disherison of a son, with respect to such property, as a moral offence only, Norman, C.J., said: "A son's widow cannot have larger legal rights against her father-in-law than her husband would have had if alive, and such husband could not have compelled his father to give him any share of his property." Mr. Justice Norman was there apparently continuing to speak of self-acquired property. He further said: "The

(1) 2 Hyde 103.

present case is wholly distinguishable from those where an heir takes property, subject to the obligation of maintaining persons excluded from inheritance out of the estate of the deceased proprietor, or whom the deceased proprietor was morally bound to maintain. In such cases the Hindu law seems to annex the duty as a burden on the inheritance in the hands of the heir, and the right of the party claiming maintenance appears to be a legal right analogous to a right of property." He then referred to Manu, ch. IX, pl. 201, 202; Daya Bhaga, ch. V, pl. 11; ch. XI, sec. 1, pl. 49, and other authorities for instances of this latter right.

A Full Bench case—*Khetrámáni Dási* v. *Kashináth Dás*[1]—of great importance, decided in Calcutta in 1868, has been cited on behalf of the defendant. It arose in the Twenty-four Parganas, and, therefore, were it dependent on any particular school of Hindu law, would have been regulated by the Bengal or Gaurya School. We think, however, that the reasoning on which the judgment mainly rested was quite as applicable in this Presidency as in Lower Bengal. It was a suit by a widow against her father-in-law claiming a monthly allowance in money for maintenance and the expenses of religious rites. She was married, when five years old, to the defendant's youngest son in 1853. He died in 1859. She alleged that after his death she was ill-treated by the defendant and his wife and daughters, and, thus being unable to stay in his house any longer, went to reside with her father. She did not assert that there was any ancestral property or any property belonging to her late husband in the possession of the defendant. The latter denied his legal liability to her in any respect, and that he or his family had ever ill-treated her, and said that she had been to his house only on two occasions, and then for the performance of religious ceremonies for the benefit of her deceased husband; that she had, against the defendant's consent and orders, refused to render the service due to him in his old age, and had chosen to reside with her father; that the defendant was not a wealthy person, and had received no heritage, "and that it was only from the earnings of a laborious service that he was able to give a somewhat decent support to his family,

(1) 2 Beng. L. R. 15 A. J.; S. C. 9 Calc. W. R. 413 and 10 *Ibid.* (F. B.) 89.

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but that being incapacitated for further service, he was compelled to place his sole dependence upon a pension of Rs. 63-4 *per mensem*." It is not so stated in the case, but it is to be inferred that the defendant and his deceased son were undivided—there being no averment to the contrary, and the latter having apparently died very young. The Court of first instance made a decree in favour of the plaintiff. The defendant appealed to the High Court. The Division Court (Norman and Seton Karr, JJ.) were disposed to think the suit unsustainable, but there being conflicting decisions[1] on the point in Bengal, referred to a Full Court this question—"Can the widow of a Hindu, refusing to live in the house of her father-in-law, maintain a suit against him for a pecuniary allowance by way of maintenance." Peacock, C.J., and Macpherson, J., were of opinion in the negative, and Loch and Kemp, JJ., in the affirmative. The decision was in accordance with the opinion of the Chief Justice. After noticing the absence of any allegation that the defendant had any ancestral property, or any property upon which the plaintiff's maintenance was a charge, he said that "two questions arose out of the point submitted for the opinion of the Full Bench, viz.: 1st, whether the widow of the Hindu, refusing to live in the house of her father-in-law, can sue him for a pecuniary allowance by way of maintenance, if she leave his house without reasonable cause; and, 2ndly, is she entitled to maintenance if she leave on account of ill-usage or other reasonable cause"—and expressed his opinion "that, according to the law as administered in Lower Bengal, a daughter-in-law has not, in either case, a legal ground of action to recover maintenance against her father-in-law. The rights of a wife or of a widow and those of the son's widow to maintenance appear to me to be governed by very different principles. A son's widow has not the same legal rights against her father-in-law as a wife has against her husband, or as a widow has against the heirs of her husband, who take his estate by inheritance. The father is not heir to his son in preference to the son's widow." After expressing his approval of the rule laid down by Norman, J., in the case above cited from 2 Hyde, 103, the Chief Justice pro-

(1) 2 Hyde 103; S. D. R. (1852) 796; 2 Calc. W. R. 134; 6 *Ibid.* 37.

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ceeded:—"The obligation of an heir to provide, out of the estate which descends to him, maintenance for certain persons whom the ancestor was legally or morally bound to maintain, is a legal as well as a moral obligation, for the estate is inherited subject to the obligation of providing such maintenance. A son who takes his father's estate by inheritance is bound to provide maintenance for his father's widow. The obligation is a charge upon the estate, which continues as long as the widow remains chaste, whether she continue to live in the family of the heirs or not." That co-residence with the heirs is, under such circumstances, non-essential, has been decided frequently (*Rájá Pirthi Singh* v. *Rání Rajcoovar*,[1] *Subosundiri Dosi* v. *Kistokissore Neoghy*,[2] *Visalatchi* v. *Annasamy*,[3] *Jádumani Dási* v. *Kheytramohini Shil*,[4]) contrary to the opinion, apparently, of Sir T. Strange,[5] but those were all cases in which there was family property from which the widow was entitled to maintenance, and it does not thence, by any means, ensue that if there be no family property, and she be notwithstanding entitled to food and raiment from her husband's family, she can insist upon it on any other condition than that of co-residence with that family and co-operation in their domestic labours. The extent to which maintenance is a charge upon ancestral estate, or the estate of her husband, has been recently considered in *Lakshman Rámchandra* v. *Sarasvatibái*[6] and *Lakshman Rámchandra* v. *Satyábhámábái*,[7] and calls for no remark here. Peacock, C.J., continued:—"I apprehend that a son's widow has no greater right to sue her father-in-law for maintenance, after her husband's death, than she would have in her husband's lifetime, if he were unable to maintain her; if there is a legal obligation, does it extend to every widow whom every son (however numerous the family) may leave without a sufficient provision for her maintenance? If not, to what extent is the rule limited by the Hindu law? I have looked carefully into the authorities, and cannot find anything to satisfy me that a son's widow is entitled

(1) 12 Beng. L. R. 238 P.C.; S. C. 20 Calc. W. R. 21. (2) 2 Taylor and Bell 190.
(3) 5 Mad. H. C. Rep. 150. (4) Vyavastha Darpana 384, 2nd edn.
(5) 1 Stra. H. L. 172, 244. (6) 12 Bom. H. C. Rep. 69.
(7) *Supra*, p. 494.

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to sue to compel her father-in-law to maintain her where he has no ancestral property, and nothing beyond his separate estate which has been acquired by himself. Some of the books speak of the husband's relations generally; but I apprehend that a brother or other distant relation cannot be legally, although he may be morally, bound to support all the widows of his brothers, or other near relations, who have no means of subsistence, unless he takes some property which renders him liable to the charge;" and again, "If the father-in-law is legally responsible for the maintenance of his daughter-in-law, where is the legal obligation to stop if he dies without leaving property?" and, again, "This is not a question of a charge upon the inheritance, for the father-in-law is not stated to have inherited anything. He states that he is a pensioner of Government, with a small pension not more than sufficient to maintain himself and his own family. It is not necessary to determine that he is so; but, for the sake of argument, it may be asked, is such a pensioner bound to maintain all the widows of all his deceased sons? Is he to save nothing for his own widow lest he should die before her, when his pension would cease?" And, again, "If a son and a father, joint in food and estate, should separate, and each take his own share of the estate, and the son after partition should enter into business, and lose all that he has taken, would the father, after the death of the son, be bound to support his widow? We must not convert all the moral obligations enjoined by the Hindu law into legal liabilities. We should do much mischief by want of care in this respect." The decree of the Court of first instance having been reversed by the Full Bench, the plaintiff appealed under section 15 of the Letters Patent, and another Full Bench, consisting of Bayley, Norman, L. Jackson, Phear, E. Jackson, Glover, and Hobhouse, JJ., unanimously affirmed the decision of the first Full Bench. Looking at the question submitted to the Full Benches and at all of the judgments delivered by the second Full Bench, that case cannot, we think, be deemed to have decided more than that a widow, voluntarily and without any ill-treatment on the part of her father-in-law and his family residing elsewhere than in his house, cannot sustain a suit against him for a pecuniary allowance by way of maintenance,

if he be not in possession either of ancestral estate or estate derived from his deceased son, her husband. It leaves the question open whether she would have any remedy against her father-in-law, for food and raiment, or pecuniary allowance for maintenance, if the misconduct of himself or his family towards the widow justified her in residing apart from him.

That case is a stronger authority for the defendant Sadásiv even than he needs, for he is not the father-in-law of the plaintiff, but a more remote kinsman of her husband Dhákji, namely, the paternal uncle of the latter, and, unquestionably, long before the death either of Dhákji or his father Bálcrustna, duly separated in estate from them. There was a strong effort made in the argument, addressed to the second Full Bench, to blend, inseparably, the moral precepts of the Smritis with the legal obligations laid down by them, but it failed to convince any one member of that Bench.

In the introduction to vol. 2, West and Bühler,[1] the authors, speaking of that case, observe that "Sir B. Peacock, C.J., in a judgment concurred in by Macpherson, J., says that 'a daughter-in-law has no legal right to a maintenance, whether she live with her father-in-law or not,'" and they remark that "Sir B. Peacock's view may, perhaps, be defended under the Daya Bhaga, which assigns no ownership to the son until the death of his father. But under the law of the Mitakshara, the son's position is essentially different, inasmuch as his joint right arises on his birth; and the widow's right to maintenance has always been recognized in this Presidency." We, however, have seen that Sir B. Peacock prefaced his remark by saying that "there is no allegation in the plaint that the defendant has any ancestral property, or any property upon which the plaintiff's maintenance is a charge," and his remark must, we think, be understood as made with reference to that state of facts. And, further, we may observe that, although Dhákji may, at his birth, if it occurred before the partition, have had, under the Mitakshara law, through his father, an interest in the family estate, his interest in the portion allotted to Sadásiv ceased on the partition, and Sadásiv then become absolute owner (so far

[1] Page xxxi.

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as Dhákji and his father were concerned) of that portion. It was not pretended that Dhákj's marriage took place until after the partition,—not, indeed, that such a circumstance could have made any difference in the plaintiff's rights. A woman, who marries a member of a joint Hindu family, does so subject to the contingency of their separation in estate. In so speaking, we are not to be understood as impeaching the case of *Comulmoney Dossee* v. *Rámnanáth Bysack*,(1) where the widow of the late proprietor was declared entitled to maintenance out of his estate after there had been a partition of the whole made without regard to her claim. A wife or mother occupies in this respect a different position from the widow of a son or other parcener, in which latter case the claim for maintenance is solely against the share allotted to him on partition made in his life-time, as shown by the cases quoted above from 2 Stra. H. L.

A Full Bench of the High Court, N. W. P., has lately (1876) held in *Gangábái* v. *Sitárám*(2) that a Hindu widow is not entitled, in a province where the Mitakshara is the predominant authority, to be maintained by her father-in-law if he have not ancestral property in his possession. The question as actually framed, and put to the Full Bench, and ruled in the negative, was—whether a widow, whose husband predeceased his father, has a right to be maintained by her husband's relations irrespectively and independently of the existence, in their hands, of ancestral funds or properties under the law obtaining in the North-West Provinces? The widow had resided with Sitárám, her father-in-law, and was maintained by him for about fifteen years after her husband's death, and, at the expiration of that time, without alleging any ill-treatment by Sitárám, went to live with her own brother. A moiety of the house, in which she had resided with Sitárám and his family, was Sitárám's ancestral property. The other moiety he had acquired by purchase. He sold the house in 1874 to Kailash Náth, in order to pay his (Sitárám's) debts. Gangábái, by her plaint filed against Sitárám and Kailash Náth, prayed that the sale should be set aside, and that she should be declared entitled to reside in a portion of the ancestral moiety of the house; also that

(1) Fulton's Rep. 189. (2) I. L. R. 1 All. 170.

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a pecuniary allowance of Rs. 5 *per mensem* should be made to her by Sitárám out of a charitable allowance made to him by Government. The Court of first instance decreed that she was entitled to reside in two rooms in the house, but refused to her any further relief. On appeal by Gangábái (Kailash Náth not appealing), the District Court affirmed the decree. On special appeal the Division Court referred the question above mentioned to the Full Bench, and received the reply already mentioned, and, on the case coming on for final disposal before the Division Court, it affirmed the decrees of the Courts below, being of opinion that the sale of the ancestral property for payment of his debts by Sitárám (under the above circumstances) did not entitle his daughter-in-law to be maintained by him. The sale being for payment of his debts,' the Court said, was one which his son, if alive, could not have resisted, for it was not suggested that the debts were contracted for immoral purposes. This remark of the Court shows that, if Kailash Náth had appealed, the decree, so far as it gave to the plaintiff a residence in the house, would have been reversed.

One of the main objects of partition is to prevent Hindu families from becoming too unwieldy in size, and thus to enable the members of such families to limit their liabilities within reasonable bounds.

The result of the circumstances of this case and of our examination of the works of the Hindu jurists of special weight in this Presidency and of the other authorities, is that, for two reasons, we think that the plaintiff must fail in this suit, viz.: 1st, that her husband and his father were, before their deaths, separated in estate from the defendant Sadásiv, her husband's uncle; and, 2nd, because, at the time of the institution of the plaintiff's suit, there was not, in the possession or subject to the disposition of Sadásiv, any ancestral estate, or estate of the plaintiff's husband or his father. Either one of these reasons, independently of the other, is, we think, fatal to the plaintiff's claim to a money allowance. My brothers Bayley, Kemball, and Green concur in this judgment.

We affirm the decree of the lower Court; but as there were decisions, at the Appellate Side of this Court, which may have

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induced the plaintiff to make this appeal, we direct that the parties, respectively, should bear their own costs.

Attorney for the appellant:—*Mr. L. Fletcher.*

Attorneys for the respondents:—*Messrs. Craigie, Lynch, and Owen.*

[APPELLATE CIVIL.]

(FULL BENCH.)

Before Sir M. R. Westropp, Kt., Chief Justice, Mr. Justice Kemball, and Mr. Justice West.

May 1.

SIDLINGAPÁ, SON OF BASAPÁ (ORIGINAL DEFENDANT), APPELLANT, *v.* SIDAVÁ KOM SIDLINGAPÁ (ORIGINAL PLAINTIFF), RESPONDENT.*

Jurisdiction—Small Cause Courts in Mufussal—Suit for maintenance.

In the absence of any special bond or other contract for the payment of maintenance, a suit for maintenance is not cognizable in a Court of Small Causes in the Mufussal.

Ordinarily, the right to maintenance does not rest upon contract. It is a liability created by the Hindu law, and arises out of the jural relation of the Hindu family. It is enforceable in numerous instances in which there is no connexion with contract.

Nobin Kálee Debeá v. *Bindoobáshinee Debeá* (5 Calc. W. R. 5 [Sm. C. C. Ref.]) followed.

THIS was a special appeal from the decision of N. Daniell, District Judge of Dharwar, reversing the decree of the Subordinate Judge of Háveri.

The case was referred to a Full Bench by Nánábhái Haridás and Larpent, JJ., on the preliminary objection raised by the respondents, that the case was one cognizable by a Court of Small Causes, and, therefore, not the subject of a special appeal.

Dhirajlál Mathurádás, for the defendants, in support of the objection:—The words "or other contract" in section 6 of Act XI of 1865 includes an implied contract for maintenance which would spring out of the contract of marriage: *Ratanshankar* v. *Gulábshankar*,(1) *Ammalla Ammul* v. *Subhu Vadiyar*.(2) There being an

* Special Appeal No. 10 of 1874.

(1) 4 Bom. H. C. Rep. 173, A. C. J. (2) 2 Mad. H. C. Rep. 184.

implied contract for maintenance, there is a debt due by the husband to the wife, and the amount claimed being under Rs. 500, the suit should be in the Court of Small Causes.

Shamráv Vithal, contra:—The right to maintenance of the wife or of any other member of a Hindu family depends on the family relation, and not upon contract. Amongst Hindus, marriage is a religious ceremony and a sacrament, not a contract. An idiot or a lunatic may, therefore, marry: *Dabychurn Mitter* v. *Rádáchurn Mitter*;[1] 1 Norton's L. C., pp. 8, 9; 1 West and Bühler, p. 280, Q. 6. Mutual consent is necessary to a contract, and there is none between infants.

The suit was not cognizable in a Small Cause Court: *Nobin Kálee Debeá* v. *Bindoobáshinee*,[2] *Bhugwan Chunder Bose* v. *Bindoo Bashinee Dossee*,[3] *Káminee Dossee* v. *Bishonáth Sháhá*,[4] *Rámbux Chittangeo* v. *Modoosoodun*,[5] *Sripátty Roy* v. *Lohárám Roy*,[6] *Shaboo Majee* v. *Noorai Mollah*.[7]

Dhirajlál Mathurádás in reply:—The pandits give no authority for the case of *Dabychurn Mitter* v. *Rádáchurn Mitter*.[8] The marriage was not disputed in the life-time of the lunatic, nor for thirty years afterwards. During his life-time it was voidable, but not void. After his death the Court would not avoid it. He also referred to the case of *Mayná Bái* v. *Uttárám*.[9]

WESTROPP, C.J.—The plaintiff, alleging herself to be the wife of the defendant, by her plaint states that, three days previously to the filing of it, he turned her out of doors with her children (of whom there are said to be two), and refused to support her. She, accordingly, sues him for maintenance at the rate of Rs. 4 *per mensem*.

The defendant, in reply, denied that, at the time mentioned by the plaintiff, he turned her out of his house, and he alleged that, about fourteen years previously, she had eloped with another man, and that her suit is barred by the law of limitation. The defend-

(1) 2 Morley's Dig. 99. (2) 5 Calc. W. R. 5 (Sm. C. Court Ref.).
(3) 6 Calc. W. R. 286|Civ. Rul. (4) 9 Calc. W. R. 214 Civ. Rul.
(5) Beng. L. Rep.—Full Bench Rul. (1862-1868), p. 675.
(6) *Ibid.* p. 687. (7) *Ibid.* p. 691.
(8) 2 Mor. Dig. 99. (9) 2 Mad. H. C. Rep. 196.

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ant further asserted that about twelve years before he filed his written statement, he had divorced the plaintiff, on the occasion of a dispute between them, before the magisterial authorities, and that she had given birth to two illegitimate children.

The Subordinate Judge of Háveri made a decree, with costs, for the defendant, on the ground that, about ten or twelve years previously to the suit, the plaintiff tore off from her neck the nuptial token, and gave it to the defendant, that she thenceforward resided with her own parents, and, subsequently to the giving of the nuptial token to the defendant, became the mother of two illegitimate children.

The plaintiff appealed to the District Judge of Dharwar, who reversed the decree of the Subordinate Judge, and awarded to her maintenance at the rate she claimed and costs. The reasoning by which the District Judge arrived at his decree seems to be that, while he believed the parties to have been separated for a much longer time than the plaintiff admitted, he did not regard the circumstance, that they lived apart by mutual consent, as amounting to desertion; that, asuming the fact to be that the plaintiff divested herself of her nuptial token, and that there had been a quarrel between her and her husband, and that she refused to return to him, those circumstances did not relieve her of her conjugal duties or position, or amount to a sufficient ground for a divorce, as the defendant might legally have compelled her to return to him, and that no proof had been given of an alleged caste custom of divorce by mutual consent; that it was still a question whether a divorced woman among the upper castes is not entitled to maintenance, that the illegitimacy of the two children was not proved, and that the divorce, if it occurred at all, was unlawful.

The defendant filed a special appeal against that decree. It is unnecessary now to state the grounds of special appeal, as the question submitted to the Full Bench by the Division Court, which entertained that appeal, was only that contained in a preliminary objection, made on behalf of the plaintiff, to the hearing of it, namely, that the suit, being for maintenance, and valued at Rs. 480, was cognizable by a Court of Small Causes under Act XI of

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1865, and, therefore, no special appeal lay. The question, then, for our determination is, whether this suit for maintenance was cognizable by a Court of Small Causes under that Act?

The sixth section of Act XI of 1865 enacts that "the following are the suits which shall be cognizable by Courts of Small Causes, namely, claims for money due on bond or other contract, or for rent, or for personal property, or for the value of such property, or for damages, when the debt, damage, or demand does not exceed in amount or value the sum of Rs. 500, whether on balance of account or otherwise." Then follows a proviso, not material to the present question. It is not pretended that there is in this case any bond[1] in respect of which the maintenance is claimed; and, in the argument in support of the jurisdiction, it was admitted that the words "or other contract" formed the only basis upon which it could be contended that the Small Cause Courts might entertain a suit for maintenance brought by a widow or other person where the maintenance was not secured by bond.

It was on both sides assumed in the argument that, at the time of the marriage, the plaintiff and defendant were in a state of infancy, as is usual amongst Hindus when marrying. It cannot be said that they were contracting parties. Hindu *patres familiarum* are on these occasions the contracting parties. They have the right to dispose of their children (while minors) in marriage, and to do so without consulting them. And it would be difficult to affirm that there is any subsequent ratification of the contract by the children, inasmuch as they have no power, on attaining majority, to ignore the marriage when complete, or subsequently to rescind or dissolve it, except under such special circumstances or usages as admit of divorce. If there be a suit for breach of the contract to marry, *i.e.*, of the betrothal, the person held liable to pay damages has, in the cases reported in Borradaile's Reports[2] and in *Umed Kiká* v. *Nagindás Narotamdás*,[3] been the father or

(1) See the case of *Soobama kom Rámráv* v. *Nánáráv bin Krishnáráv*, 2 Morris S. D. Rep. 170.

(2) *Atmárám Kesoor* v. *Sheolál Mulookchand*, 1 Borr. 397 (2nd edn.); *Khooshál* v. *Bhugwan Motee*, 1 *Ibid.* 155; *Kasirám* v. *Bhugwan*, 2 *Ibid* 528; *Deochand* v. *Javehar*, *Ibid.* 576; *Mt. Raliyat* v. *Madhowji Pánáchand*, *Ibid.* 739.

(3) 7 Bom. H. C. Rep. 122, O C.J.

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other adult relative who made the promise that the marriage should take place, and not the intended husband or wife.

Minors, idiots, and lunatics are by Hindu law unable to contract (1 Stra. H. L. 271); yet not only are the marriages of infants upheld, but it has been distinctly laid down that the marriage of a Hindu lunatic is valid (*Dabychurn* v. *Rádáchurn*;[1] 1 West and Bühler, p. 288, Q. 6).

But, further, we should take too narrow a view of the nature of maintenance if we were to limit it to the case of husband and wife. In numerous instances maintenance is recoverable, in which there is not the most remote connexion with contract: *e.g.*, where a Hindu, personally disqualified from inheritance by congenital blindness, or deafness, or dumbness, or insanity, or idiotcy, or sanious leprosy, or illegitimacy, is entitled to be maintained out of the family estate by the next heir who takes it. So, too, a continuous concubine of the deceased proprietor is entitled to maintenance.[2] It cannot be said that her title to it rests upon contract. The proper view seems to us to be to regard maintenance, in its general aspect, as a liability created by the Hindu law in respect of the jural relations of the Hindu family, and this would be so even in the case of the continuous concubine just mentioned. For she is the *dási* or *sudri* or *serva* of the *pater familias*. The liability of the husband to maintain his wife is an obligation arising out of the *status* of marriage amongst Hindus, expressly imposed by their law.[3] And, generally, in such other instances in which maintenance is prescribed by the same law, we hold that the right depends on the *status* to which the law appends it. Even in England and other Christian countries, marriage creates a special *status* from which, and not, except mediately, from the volition of the parties, spring the rights and duties of married people as such. In *Mordaunt* v. *Mordaunt*[4] Lord Penzance says: "But, is it true

(1) 2 Morley's Dig. 99.

(2) See *Khemkor* v. *Umiáshankar*, 10 Bom. H. C. Rep. 381; *Vrándavandás* v. *Yamunábái*, 12 *Ibid.* 229.

(3) See as to obligations arising out of the *status* of marriage and other family relations, Savigny, *Traité de droit Romain*, vol. I, liv. II, ch. 1, pp. 335, 336—Fr. trans. by M. Guenoux, Paris edn., 1840; 2 Austin Jur. pp. 422, 424, edn. of 1863.

(4) L. R. 2 Pro. and Div. 103 at p. 126.

that marriage is an ordinary contract? Surely, it is something more. I may be excused if I dwell somewhat on this matter, because I conceive it lies at the very root of the question in discussion. Marriage is an institution. It confers a *status* on the parties to it, and upon the children that issue from it. Though entered into by individuals, it has a public character. It is the basis upon which the framework of civilized society is built, and, as such, is subject in all countries to general laws which dictate and control its obligations and incidents, independently of the volition of those who enter upon it." We have not overlooked *Govindá* v. *Bápoo*,[1] a case not turning upon the married *status*. The foregoing considerations show that the reasoning which prevailed there does not apply here.

There are conflicting decisions as to the jurisdiction of Courts of Small Causes in the Mufussal.

In *Rámchandra Dixit* v. *Savitribái*,[2] Couch, C.J., and Newton, J., held that no special appeal lay in a suit by a widow against her step-son for arrears of maintenance under Rs. 500, because they were of opinion that such a suit was cognizable by a Court of Small Causes; but they gave neither reason nor authority for that opinion. They followed that decision in *Judal* v. *Hirá*[3] (*Ibid.* p. 75), but gave no reasons. Those cases seem to have been doubted by Sargent C.J. (Acting), and Melvill, J., in *Rámabái* v. *Trimbak*.[4] In *Bhagvan Chunder Bose and others* v. *Bindoo Bashinee Dossee*[5] Shumbhunáth Pandit and Bayley, JJ., ruled that a Small Cause Court has jurisdiction only as regards arrears of fixed maintenance, but not to determine the right to maintenance, if in dispute. They did not refer to, and do not appear to have been acquainted with, the earlier decision which we next proceed to mention.

In *Nobin Kálee Debeá* v. *Bindoobáshinee Debeá*,[6] decided in 1866, Peacock, C.J., and L. Jackson, J., held that a suit for maintenance is not cognizable by a Small Cause Court, as maintenance "is not a claim for money due upon contract, and does not fall within the definition of any of the claims made cognizable by Act

(1) 5 Mad. H. C. Rep. 200. (2) 4 Bom. H. C. Rep. 73, A.C.J.
(3) *Ibid.* 75. (4) 9 Bom. H. C. Rep. 283. (5) 6 Calc. W. R. 286 Civ. Rul.
(6) 5 Calc. W. R. (Sm. C. C. Ref.) p. 5.

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XI of 1865, section 6." They added:—"If a case of the sort is not cognizable, it makes no difference that a particular case does not involve intricate questions of law or fact." In that case it appeared that the plaintiff had previously obtained a decree of a Civil Court fixing her maintenance at Rs. 7 *per mensem*, and subsequently another decree for arrears of that maintenance, and brought the suit (the subject of the reference to the High Court) in a Small Cause Court for further and other arrears.

In a later case (*Káminee Dossee, widow of Chunder Mohun Sháhá*, v. *Bishonáth Sháhá*[1]) Peacock, C.J., and Bayley, J., held that a suit by a widow for arrears of maintenance fixed by Munsiff's decree (in which suit the defendant disputed his liability, on the ground that the property of the plaintiff's husband, which had come to his hands, was exhausted, and stated that the defendant had brought a suit to be relieved from his liability under the Munsiff's decree) was not cognizable by a Small Cause Court in the Mufussal.

With reference to the two last-mentioned cases, it may be well to draw attention to the remark in the recent case of *Lakshman Rámchandra* v. *Satyábhámábái*[2] censuring the unnecessary multiplication of suits for the maintenance of one and the same widow. If the first suit were properly framed, and a continuing decree for the payment of her maintenance at a fixed monthly, annual, or quarterly rate were made, any further decree would be unnecessary, unless either party, by suit or otherwise, brought to the notice of the Court that circumstances rendered it equitable that the rate should be enhanced or reduced. Many circumstances might be suggested which would do so: *e.g.*, a marked increase or diminution in the value of the estate or of its annual yield, the destruction of a portion of the estate (out of which the maintenance is payable), or an addition to it, by, say, the shifting of the course of a river, or other cause—(see *Shrirám Buttacharji and another* v. *Puddomookhee Debiá*.[3])

The very possible necessity of varying the maintenance from time to time and of enquiring into the circumstances of the claimant, or of the family estate, or the family itself, show how unsuit-

(1) 9 Calc. W. R. 214 Civ. Rul.

(2) *Supra*, p. 494.

(3) 9 Calc. W. R. 152 Civ. Rul.

able maintenance suits are for the Small Cause Courts.[1] We say the family itself: because additional burdens may, from time to time, be cast upon the family estate. Other widows, besides the previous claimant, may be thrown upon it for support by the death of their husbands, or the number of sons and daughters of the male co-parceners may have increased. With respect to suits brought upon continuing decrees in the ordinary Civil Courts for present and prospective maintenance, merely for the purpose of enforcing payment of that maintenance, we must say that they not only are unnecessary but unsustainable. If, indeed, they were brought to evade the operation of the law of limitation, they ought, upon that gound alone, to be discountenanced (see on these points *Manchárám* v. *Bakshi Sáheb*,[2] *Sandes* v. *Jomir Sheikh*[3]). The excuse does not in such cases exist that has been relied upon in actions in the High Court upon a decree of a Presidency town Small Cause Court, that execution can, by such action, be obtained against a species of property which the latter Court cannot take in execution.

The last case which we shall mention (*Ningangavdá* v. *Baslingavdá*[4]) is unreported. It was a suit by a daughter-in-law against her father-in-law for maintenance. She had obtained decrees in the Courts below, and he (who contested her right) having made a special appeal to the High Court, it was objected on her behalf that the suit was cognizable in a Court of Small Causes, and, therefore, a special appeal would not lie; a Court, however, consisting of Westropp, C.J., and Kemball and Nánábhái, JJ., held that such a suit was not within the jurisdiction of a Small Cause Court, and overruled the objection; but on the merits affirmed the decrees of the Courts below.

We are prepared fully to adopt the decision of Peacock, C.J., and L. Jackson, J., in the case of *Nobin Kálee Debeá* v. *Bindoobáshinee* above cited from 5 Calc. W. R., Sm. C. Ct. Ref., p. 5.

(1) That under such circumstances the Court will not struggle with the language of the Statute in order to amplify the jurisdiction of Small Cause Courts, see per Peacock, C.J., in *Rámbux* v. *Mudhusoodhun*, Beng. L. R. (F. B. Vol.) 675 at page 681.

(2) 6 Bom. H. C. Rep. 231. (3) 9 Calc. W. R. 399 Civ. Rul.

(4) Sp. Ap. 101 of 1870, decided on the 20th July 1870.

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We think that (in the absence of any special bond or other contract for the payment of maintenance) the question referred to us, viz., 'whether a suit for maintenance s cognizable in Court of Small Causes in the Mufussal,' must be answered in the negative.

[APPELLATE CIVIL.]

(FULL BENCH.)

Before Sir M. R. Westropp, Kt., Chief Justice, Mr. Justice Kemball, and Mr. Justice West.

May 1.

APAJI CHINTAMAN DEVDHAR (ORIGINAL DEFENDANT), APPELLANT, *v.* GANGABAI KOM DAJI CHINTAMAN (ORIGINAL PLAINTIFF), RESPONDENT.

Jurisdiction—Small Cause Court—Act XI of 1865*—Suit for maintenance—Brother's widow.*

In a suit by a Hindu widow against her husband's brother for an allowance as maintenance and for the expenses of a pilgrimage,

Held (following *Sidlingápá* v. *Sidává kom Sidlingápá*(1)) that the suit, although for a sum under Rs. 500, was not cognizable by a Court of Small Causes under Act XI of 1865, there being no allegation that the maintenace claimed was secured by bond or other special contract.

Held also (following the case of *Savitribái* v. *Luximibái*(2)) that the defendant was not liable, inasmuch as he was not in possession of any ancestral property and had not received any property from the plaintiff's husband.

THIS case was referred to a Full Bench by Kemball and Nánábhái Haridás, JJ. The facts are sufficiently stated in the following judgments:—

WESTROPP, C.J.—This is a suit by a Hindu widow against the brother of her late husband for a pecuniary allowance as maintenance and the expenses of a pilgrimage to Benares. The defendant denied that he had any ancestral property, or that his deceased brother, the husband of the plaintiff, left any property. He further said that the plaintiff had, from the time of her husband's death, sixteen or seventeen years ago, resided with her mother, who allowed her 2 *bighas* of land, and that he (the defendant) was willing to allow her to live in his house, and that he gives her two '*lugdas*' per annum. He denied any responsibility in respect of her pilgrimage. The Subordinate Judge of Kalyán

(1) *Supra*, p. 624. (2) *Supra*, p. 573.

made a decree against her, which was reversed by the Assistant Judge of Thánâ, who held her to be entitled to Rs. 4 *per mensem* as maintenance, but not to the expenses of the pilgrimage. The Assistant Judge, although finding, as a fact, that the defendant and his deceased brother had not any ancestral property, held, on the authority of *Timmâppâ Bhat* v. *Parmeshriâmmâ*,[1] that the plaintiff was nevertheless entitled to a pecuniary allowance as maintenance from the defendant personally, and that she was not bound to reside with him.

The defendant filed a special appeal against that decree, and the Division Court (Kemball and Nánábhái Haridás, J.J.,) have referred to a Full Bench a preliminary question raised before them, viz., whether the suit (being for a sum under Rs. 500) was cognizable by a Court of Small Causes under Act XI of 1865; for, if it were, no special appeal would lie.

That question, for the reasons already given in the case of *Sidlingâpâ* v. *Sidává*,[2] must, we think, be answered in the negative, the maintenance claimed not being alleged to be secured by bond or other special contract.

The preliminary point with respect to jurisdiction having been decided, the case (on 24th June 1878) came before the Appeal Court, consisting of Westropp, C.J., and Kemball, J., for decision on the merits, when the following judgment was delivered:—

WESTROPP, C.J.:—The question whether a Court of Small Causes could have entertained this suit, referred to a Full Bench by the Division Court, having been by the Full Bench decided in the negative, it now remains for the present Division Court—Mr. Justice Nánábhái Haridás, who was one of the referring Judges, being no longer on the Bench—to dispose of the suit on the merits. It is one by a widow against the brother of her late husband for a pecuniary allowance as maintenance and the expenses of a pilgrimage to Benares. The defendant alleged that he had not any ancestral property, and that he did not derive any property from his deceased brother, the husband of the plaintiff, and the Courts below have found this allegation to be true. The Subordinate Judge decreed against the plaintiff, but his decision was reversed by the Assistant Judge, who relied upon *Timmâppâ* v.

(1) 5 Bom. H. C. Rep. 130 A. C. J. (2) *Supra*, p. 624.

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Parmeshriámmâ.[1] However, in the case of *Savitribái* v. *Luximibái*[2] decided on the 1st May 1878, which was a suit by a widow against her husband's paternal uncle, a Full Bench of this Court held that the fact that the latter had no ancestral property, or property which had belonged to his deceased nephew, the husband of the plaintiff, constituted full and sufficient defence to the suit. The reasoning by which the Full Bench arrived at its conclusion in that case is applicable to the present case, and it is unnecessary to repeat it here. The case relied upon by the Assistant Judge has been fully discussed in that case. We reverse the decree of the Assistant Judge, and restore that of the Subordinate Judge, except that we direct the parties respectively to bear their own costs of the suit and both appeals.

(1) 5 Bom. H. C. Rep. 130, A. C. J. (2) *Supra*, p. 573.

[APPELLATE CIVIL.]

Before Sir M. R. Westropp, Kt., Chief Justice, and Mr. Justice Kemball.

May 1.

SIDLINGÁPÁ, SON OF BASÁPÁ (ORIGINAL DEFENDANT), APPELLANT, *v.* SIDÁVÁ KOM SIDLINGÁPÁ (ORIGINAL PLAINTIFF), RESPONDENT.*

Hindu law—Separate maintenance, wife's right to.

Although by Hindu law a husband is bound to maintain his wife, she is not entitled to a separate maintenance from him, unless she proves that, by reason of his misconduct or by his refusal to maintain her in his own place of residence, or other justifying cause, she is compelled to live apart from him.

AFTER the decision of the Full Bench reported above, at page 573, this case came before a Division Bench for its final disposal on the merits.

Shamráv Vithal for the appellant.

Respondent was not represented.

WESTROPP, C.J.:—Although by Hindu law a husband is bound to maintain his wife, she is not entitled to a separate maintenance from him, unless she establishes in proof that, by reason of his misconduct or by his refusal to maintain her in his own place of residence, or other justifying cause, she is compelled to live

* Special Appeal No. 10 of 1874.

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apart from him (see special appeal No. 307 of 1872, Printed Judgments of 1873, page 1). There is not any finding, by the District Judge, that the plaintiff has proved any such case. On the contrary, the District Judge appears to have believed that she voluntarily tore off her nuptial ornament, and returned it to her husband, and of her own accord left him. We reverse the decree of the District Judge, and restore that of the Subordinate Judge, except as to costs. We direct that the parties, respectively, bear their own costs of the suit and of both appeals.

[APPELLATE CIVIL.]

Before Sir M. R. Westropp, Kt, Chief Justice, and Mr. Justice Melvill.

1877 November 22.

KÁCHUBHAI BIN GULABCHAND AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS, *v.* KRISHNÁBÁI KOM BÁBÁJI (ORIGINAL PLAINTIFF), RESPONDENT.*

Evidence—Act I of 1872, *Section* 91—*Registration—Practice.*

A deed of partition was executed among three brothers, C, N, and B, on the 19th March 1867, but was not registered. It recited that, some years previously to its date, a division of the family property, with the exception of three houses, had been effected, and it purported to divide these houses among the brothers. In a suit brought by C's widow for the recovery of the house which fell to C's share.

Held that, although the deed did not exclude secondary evidence of the partition of the family property previously divided, yet it affected to dispose of the three houses by way of partition made on the day of its execution, and, therefore, secondary evidence of its contents was inadmissible under section 91 of the Indian Evidence Act.

A Judge is not permitted to make in appeal a different case for the appellant from that which he alleged for himself in the Court of first instance.

THIS was a special appeal from the decision of W. H. Newnham, Acting Judge of Puna, reversing the decree of Dinanáth Atmárám Dalvi, Second Class Subordinate Judge at Junnar.

The facts of the case appear from the judgment of the High Court.

* Special Appeal No. 211 of 1877.

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KÁCHUBHAI BIN GULÁB-CHAND AND ANOTHER v. KRISHNÁBÁI KOM BÁBÁJI.

The *Honourable Ráv Sáheb Vishvanáth Náráyan Mandlik* for the appellant.

Shamráv Vithal for the respondent.

WESTROPP, C.J.:—In this case the plaintiff Krishnábái seeks to eject the defendant Harakchand from a house which he purchased under a decree for sale thereof in a suit brought by the defendant Káchubhai on a mortgage, dated 27th August 1872, executed to him by Chimnáji, a brother of the plaintiff's deceased husband Bábáji. The plaintiff claimed title through Bábáji, to whom she alleged that, on a partition anterior to the mortgage, the house had been allotted. In support of that case she produced a deed of partition, dated the 19th March 1867, which appears to be a genuine instrument, but is unregistered. The Subordinate Judge and the District Judge concur in holding that deed to be inadmissible in evidence, and that secondary evidence of the partition is excluded by section 91 of the Indian Evidence Act (I of 1872). The deed speaks of the bulk of the family property as having been divided two or three years previously to its date, but recites that there remained undivided three houses, and it then proceeds to state that those three houses were on that day (*i.e.*, the 19th March 1867) divided between the three brothers Chimnáji, Náráyan, and Bábáji, and that the house now in dispute was the one allotted to Bábáji. Although that deed most certainly would not exclude secondary evidence of the partition of the bulk of the family property, which it treated as having been divided two or three years previously, and cannot be regarded as disposing of or at all dealing with that portion of the family property, yet it did affect to dispose of the three houses, by way of partition, made on the day of its execution, and, therefore, under section 91 of the Indian Evidence Act, rendered secondary evidence of its contents inadmissible. So far, and in regarding the deed itself as inadmissible for want of registration, we concur with both the Subordinate Judge and the District Judge. The Subordinate Judge under these circumstances rightly, as we think, held that the plaintiff could not sustain her suit. But the District Judge, notwithstanding his ruling as to the inadmissibility of the deed of partition and of secondary evidence of it,

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proceeded, as he said upon the evidence, to hold that the house was the house of Bábáji, and not of Chimnáji, and, therefore, that the plaintiff was entitled to recover it. Having regard to his previous ruling that the partition-deed and secondary evidence of it were inadmissible, we must deem the District Judge as holding that, irrespectively of partition, Bábáji was entitled to the house. That, however, was making a totally different case for the plaintiff from that which she alleged for herself. She asserted a title founded on partition. The Judge conjectured and found a title irrespective of partition. This, we think, he was not at liberty to do. His judgment seems to have been a benevolent attempt on his part to discover a path for the bereaved plaintiff out of the provisions of section 91 of the Indian Evidence Act, and to relieve her from the consequences of the neglect of her husband to register the deed. We must reverse his decree, and restore that of the Subordinate Judge. The plaintiff must pay the costs of the suit and of the regular appeal. The parties, respectively, must bear their own costs of the special appeal.

[APPELLATE CIVIL.]

Before Sir M. R. Westropp, Kt., Chief Justice, and Mr. Justice Pinhey.

1878
June 11.

KALO NILKANTH (ORIGINAL DEFENDANT), APPELLANT, *v.* LAKSHMIBÁI KOM KALO NILKANTH (ORIGINAL PLAINTIFF), RESPONDENT.*

Suit for maintenance—Limitation—Act XIV of 1859, *Section* 1, *Clauses* 14 *and* 16.

The provision of the Limitation Act of 1859, applicable to suits brought under that Act for maintenance not chargeable upon any estate, is clause 16 of section 1, which gives six years from the accruer of the cause of action. The cause of action in such cases does not arise until there has been a demand and refusal of maintenance.

THIS was a second appeal from the decision of W. Sandwith, District Judge of Dharwar, affirming the decree of A. M. Cantem, Subordinate Judge of the same place.

In appeal, the District Judge, among others, framed two issues viz., whether plaintiff ever lived with defendant after coming to the age of puberty, and whether the claim for maintenance was

* Second Appeal No. 253 of 1877.

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barred; and found in the negative on both of them. He applied the Limitation Act IX of 1871, schedule 2, article 128.

Manekshâh Jehângirshâh for the appellant:—The Judge found that the plaintiff never lived with her husband. She has, therefore, no right to a separate maintenance. By Hindu law, a wife is only justified in leaving her husband's house and demanding a separate maintenance on the ground of his misconduct: *Mudvállápá* v. *Gursátáwá*.[1] But if she, without her husband's sanction, leave him and live with her mother, she has no right to separate maintenance: Shámachurn Sircar's Vyavastha-Darpana, p. 374, (2nd edn.) He is not bound to support her if she leave him without his consent: Steele on the Law and Custom of Hindu Castes, p. 171. Act IX of 1871 does not apply to the case, but Act XIV of 1859, section 1, clause 16.

There was no appearance for the respondent.

WESTROPP, C.J.:—It is not competent for this Court to re-open the question of co-habitation of the plaintiff and defendant, or of the continence of the plaintiff. Those are questions of fact disposed of by the Courts below. The District Judge has, on the point of limitation, erroneously applied Act IX of 1871 to this cause, which was commenced in 1872 before that Act came into force. Section I, clause 14 of Act XIV of 1859, is also inapplicable, as this is not a case of maintenance chargeable on any estate. The provision of that Act which is applicable is section 1, clause 16, which gives six years from the accruer of the cause of action, and it does not accrue until there has been a demand and refusal. (See special appeal 1041 of 1864, and the note to vol. 2, West's Acts, p. 139.) No demand or refusal has been proved to have occurred prior to the bringing of this suit, which is in itself a sufficient demand, and the defence is a sufficient refusal.

We must, accordingly, on those grounds affirm the decree of the District Judge.

[1] S. A. No. 307 of 1872, decided by Sargent and Melvill, J.J., on the 14th January 1873.

[APPELLATE CIVIL.]

Before Sir M. R. Westropp, Kt., Chief Justice, and Mr. Justice Kemball.

MADHAVRAV KESHAV TILAK AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS, *v.* GANGABAI (ORIGINAL PLAINTIFF), RESPONDENT.* 1878 July 1.

Maintenance, amount of, granted to Hindu widow.

A Hindu widow is not entitled to a larger portion of the annual produce of the family property as maintenance than the annual proceeds of the share to which her husband would have been entitled on partition, if he were living.

THIS was a special appeal from the decision of A. D. Pollen, Acting Assistant Judge at Ratnágiri, affirming the decree of Mukundráv Bhaskar, Subordinate Judge at Dápoli.

The plaintiff Gangábái sued the defendants for maintenance, and obtained decrees against them in both the lower Courts. The defendants thereupon preferred the present special appeal.

The *Honourable Ráv Sáheb V. N. Mandlik* for the appellants:—The decree of the lower Court is improper, so far as it awards maintenance to the plaintiff beyond the amount produced by the share of her husband in the ancestral estate.

M. C. Apte for the respondent.

WESTROPP, C.J.:—Parashrám, the husband of the plaintiff Gangábái, is stated by her to have died about twenty-five years previously to the filing of her plaint in this suit, to which she has made her husband's brother Madhavráv, his nephew Govind, his great nephew Keshav *alias* Báláji, and his nephew Balkrishna parties as defendants. It is not denied that, at the death of her husband, he was undivided in estate from the defendants. It has been contended, on her behalf, that the annual proceeds of her husband's share (which has been found to be one-fourth) would not be sufficient for her maintenance, and that she is entitled to such additional allowance from the defendants (his co-parceners) as together with those annual proceeds will give her a sufficient maintenance. It seems, however, to this Court to be a corollary to the recent Full Bench decision in the case of

* Special Appeal No. 296 of 1876.

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Savitribái v. *Laxmibái and Sadáshiv*,[1] that the widow is not, at the utmost, entitled to a larger portion of the annual produce of the family property than the annual proceeds of the one-fourth share to which her husband would have been entitled on partition were he now living. We vary the decree of the Assistant Judge by declaring the plaintiff to be entitled, as against the defendants, henceforward to a maintenance not exceeding the annual proceeds of one-fourth of the family property; and that as it is admitted that such annual proceeds will not be more than sufficient for her maintenance, the whole of the annual proceeds of such one-fourth share shall be paid to her as such maintenance, and that six years' arrears of such annual proceeds previously to the filing of the plaint, and all such arrears thereof as may have accrued due to her since that day (the 30th August 1873), shall be paid to her by the defendants. And we are of opinion that the said decree must be further amended by directing the Subordinate Judge to ascertain what sum fairly represents the annual proceeds of one-fourth of the said family property, and to take such evidence as may be necessary for that purpose; and we direct that the said maintenance henceforward to be paid to the plaintiff, and the said arrears due as aforesaid, previously and subsequently to the filing of the plaint, shall be computed in conformity with the sum which the Subordinate Judge shall so ascertain to be such annual proceeds of one-fourth part of the said family estate. The plaintiff is, we think, entitled to her costs of the suit, and we direct the parties, respectively, to bear their own costs of both appeals.

Decree amended.

(1) *Supra*, p. 373.

[APPELLATE CIVIL.]

1878
July 2.

Before Sir M. R. Westropp, Kt., Chief Justice, and Mr. Justice Kemball.

LALLU GANESH (APPLICANT) *v.* RANCHHOD KAHANDAS (OPPONENT).*

The Code of Civil Procedure (Act X of 1877), Section 5, Chapter XX, (Section 344 to Section 360), and Schedule II—Jurisdiction—Small Cause Court—Insolvency.

The effect of section 5 of the Code of Civil Procedure (Act X of 1877), coupled with the second schedule to that Act, is to render the whole of chapter XX (relating to insolvent debtors) of the Code, including section 360, inapplicable to Courts of Small Causes in the Mufassal, notwithstanding the words "any Court other than a District Court" and "any Court situate in his district" which occur in that section. Consequently, the Government Resolution No. 2133, of the 3rd of April 1878, investing the Judge of the Court of Small Causes at Ahmedabad with powers, under the said chapter, to adjudicate in insolvency matters, is *ultra vires* and invalid.

THIS was a reference, under section 617 of the Code of Civil Procedure (Act X of 1877), from C. M. Cursetjee, Judge of the Court of Small Causes at Ahmedabed. In submitting it the Judge made the following remarks:—

"Defendant (in suit No. 2762 of 1875) was arrested under a decree against him in the said suit, but was set at large under the provisions of section 336 of Act X of 1877, on his expressing his intention of getting himself declared an insolvent. He seems to have made the proper application to the District Court under chapter XX of the Act. The District Court has, however, under recent resolution of the Bombay Government, No. 2133,† passed on 3rd April 1878, and published at page 257, *Government Gazette*, transferred the said application to this Court for investigation * * *

"Now the question for the opinion of the honourable the High Court is, has this Court jurisdiction to entertain the application? I am of opinion that a Court of Small Causes in the Mufassal has no jurisdiction.

*Small Cause Court Reference No. 4 of 1878.

† "The Honourable the Governor in Council is pleased, under section 360 of the Code of Civil Procedure, to invest the Judge of the Court of Small Causes at Ahmedabed with the powers conferred on a District Court by sections 344 to 359 (both inclusive) of the said Code."

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"The New Civil Procedure Code does not entirely apply to Mufassal Courts of Small Causes. By section 5, certain chapters, or parts of certain chapters, only are made applicable, and it is expressly declared that 'the other chapters and sections of this Code do not extend to such Courts.' Schedule II, annexed to the said Code, contains the particular portions of the Code extended to this and other Courts; and it excludes, among other chapters and sections, the whole of chapter XX.

"From this it will be seen that it has been the deliberate intention of the Legislature not to apply chapter XX, providing for insolvent judgment-debtors, to these Small Cause Courts. Accordingly, I submit that the Government Resolution, above quoted, is *ultra vires*, and can give this Court no power which the Legislature has expressly withheld from it."

None of the parties appeared.

WESTROPP, C. J.:—The Court is clearly of opinion that the effect of section 5 of the Civil Procedure Code (Act X of 1877), coupled with the second schedule to that Act, is to render the whole of chapter XX of the Code, including section 360, inapplicable to Courts of Small Causes, notwithstanding the words "any Court other than a District Court" and "any Court situate in his district" which occur in that section. The consequence of this construction of the Code is that Government resolution No. 2133, of the 3rd April, 1878, at page 257 of Part I of the *Bombay Government Gazettte* of 1878, must be regarded as *ultra vires* and invalid.

Order accordingly.

In consequence of the above decision, the Bombay Government cancelled the resolution above referred to (No. 2133 of 1878) and a similar resolution relating to another Court of Small Causes in the Mufassal.

[APPELLATE CRIMINAL.]

Before Mr. Justice Kemball and Mr. Justice Pinhey.

EMPRESS *v.* MALKÁ.

1878
July 4.

Code of Criminal Procedure, (Act X of 1872,) Section 122—Power of a Magistrate to record a statement of a person not accused of an offence.

Section 122 of the Code of Criminal Procedure (Act X of 1872) authorizes a Magistrate to record the statement of a person who appears before him as a witness, as well as the confession of a person accused of an offence.

THIS was a reference, under section 296 of the Code of Criminal Procedure, by J. Elphinstone, Magistrate of Dharwar, under the following circumstances:—

During the investigation, by the police, of a charge of murder against one Pirá bin Paranná, a constable of police took the present accused Malká to the Second Class Magistrate of Hángal, Ráv Sáheb Murár Vithal, who, under section 122 of the Code of Criminal Procedure, took down his statement. In this statement Malká mentioned that "Pirá with a stick, which was in his hand, struck the deceased a blow on the right side of his head." The statement was made on solemn affirmation, and recorded with the object of preventing Malká from making a different statement before the committing Magistrate.

The preliminary inquiry into Pirá's case was held by Mr. C. P. B. Wiltshire, Magistrate, F. C., Dharwar. Before him Malká deposed, also, on solemn affirmation, that he knew nothing about the case, and was, in consequence, directed by him, as well as by the Magistrate of the District, to be prosecuted before Mr. J. C. Anding, Magistrate, F. C., in the same district, for giving false evidence in a judicial proceeding under section 193 of the Indian Penal Code.

When the case of Malká came up before Mr. Anding, he was of opinion that the procedure of the Second Class Magistrate of Hángal, in recording the statement of Malká, in the murder case against Pirá, under section 122 of the Code of Criminal Procedure, with a view to prevent him from altering his statement before Mr. Wiltshire, was illegal, and, consequently, that the statement itself was null and void. He considered that section 122 applied only

* Criminal Reference No. 82 of 1878.

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to persons accused by the police or by other persons, and not to witnesses. Mr. Anding, accordingly, discharged Malká under section 215 of the Code of Criminal Procedure.

Thereupon Mr. J. Elphinstone, Magistrate of Dharwar, reported the proceedings for the orders of the High Court, as he felt a doubt as to the correctness of Mr. Anding's view. It appeared to him that the words "by any person," not being in any way qualified, included witnesses as well as persons accused of an offence.

KEMBALL, J. :—The Court concurs with the District Magistrate in thinking that Mr. Anding's view is wrong. It, therefore, annuls his order of discharge, and directs that the trial of Malká be proceeded with and disposed of according to law. Section 122 of the Code of Criminal Procedure clearly contemplates two distinct cases: one is that of a person coming forward to state what he knows; the other is that of a person accused by a police officer of an offence who comes forward to confess his guilt. With regard to the former, the section provides that the statement made by him shall be recorded in the manner prescribed for recording evidence—that is to say, under section 331 of the Code of Criminal Procedure, on oath or affirmation; whereas in the case of an accused person confessing to an offence of which he is accused, the Code, by section 345, enacts that neither oath nor affirmation shall be administered to him.

Order accordingly.

[ORIGINAL CIVIL.]

Before Sir M. R. Westropp, Kt., Chief Justice, and Mr. Justice Bayley.

July 5.

LUCKMIDAS VITHALDAS (ORIGINAL PLAINTIFF), APPELLANT, *v.* EBRAHIM OOSMAN (ORIGINAL DEFENDANT), RESPONDENT.*

Ex-parte decree, right of appeal against—Code of Civil Procedure (Act X of 1877), chap. XXXIX and sections 588-591—Summary procedure on negotiable instruments.

Held—An appeal lies from an order, made under section 534 of the Civil Procedure Code of 1877, refusing to set aside an *ex-parte* decree.

THIS was a summary suit brought by plaintiff upon a promissory note under the provisions of chapter XXXIX of the Civil

* Suit No. 340 of 1878.

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Procedure Code of 1877. The summons was served upon the defendant on the 26th January 1878. The defendant, however, did not obtain leave to appear and defend, and an *ex-parte* decree was passed against him on the 7th July 1878.

On the same day upon which the decree was made, the defendant applied, under section 534 of the Civil Procedure Code of 1877, to have the decree set aside, and obtained a rule *nisi*. On the 28th March, Pinhey, J., discharged the rule, and declined to set aside the decree. The defendant then obtained a rule *nisi*, calling on the plaintiff to show cause why his memorandum of appeal against the decree of the 7th July and the order of the 28th March should not be admitted, and execution of the decree stayed. The rule now came on for argument.

Inverarity, for plaintiff, showed cause:—We contend that there is no appeal from an order, made under section 534 of the Code, refusing to set aside an *ex-parte* decree. No appeal is given in chapter XXXIX, which deals with suits like the present. Section 588 does not give an appeal, and section 591 applies only to orders made *prior to decree*, and not to an order, like the present, which was made subsequent to the decree, and which could not affect the decision of the case. The only orders appealable under section 591 are orders by which the Judge may have been misled in deciding the case, and which must have been made prior to the decree. How can the order, now appealed from, have affected a decision which was arrived at weeks before the order was made? If an appeal is permitted to a defendant, who, *after* a decree has been made, asks leave to come in and defend the suit, it cannot be refused to a defendant who, before decree, has been refused leave by a Judge in chamber, and, if this be allowed, a defendant by appealing might indefinitely postpone the decision of a suit, and thus the whole policy of chapter XXXIX would be upset, and the summary remedy, intended to be given in cases of negotiable instruments, would be taken away.

Macpherson, for defendant, in support of the rule:—There is no section in this Code which forbids an appeal in suits brought under chapter XXXIX, and, therefore, the general provision of section 540 applies. The earlier words of section 591 include all orders of whatever kind, and that section provides for appeals in

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cases of such orders only as involve error, defect, or irregularity "affecting the decision of the case." These words "affecting the decision of the case" do not apply to "such orders," but to the previous words "error, defect, or irregularity."

We contend that the order appealed against did involve an error affecting the decision of the case. The "decision of the case" is not arrived at until the Judge has disposed of the application (if any) under section 534. It is only under that section that a defendant, who has not got leave to defend, can be heard. Even taking "decision" as synonymous with "decree," it may be affected by an order subsequent to it as well as by an order prior to it. Section 591 is much more comprehensive than the corresponding section 363 of the Code (Act VIII) of 1859, by which no appeal was given from an order "*prior to* decree." These words are omitted in the new Code.

The *ex-parte* decree made in a summary suit, like the present, cannot be distinguished from *ex-parte* decrees generally. Under section 540 an appeal would lie against an *ex-parte* decree; but no appeal could possibly succeed, unless an application has been previously made, under section 108, to set aside the decree. The appeal would, therefore, really lie against the order made after decree under section 108. It is clear that "decree" and "decision" are not convertible terms. An appeal against an *ex-parte* decree, under section 100, would include an appeal against the order made under section 108. By section 119 of Act VIII of 1859 no appeal was permitted against an *ex-parte* decree; but a defendant could apply to the Court to set aside a decree, and if the application was rejected, an appeal against the order of rejection might be brought. Section 591 of the new Code preserves this right of appeal. There is no other provision in this Code allowing appeals from *ex-parte* decrees.

[*Inverarity* referred to section 588, clauses *f* and *v*, as provisions allowing appeals from some *ex-parte* decrees.]

Section 531 of the Code corresponds with the 4th section of Act V of 1866. Under sections 4 and 7 of this Act and section 119 of Act VIII of 1859 we would have had a right of appeal before the new Code came into force. That right is not expressly taken away by the new Code.

[*Inverarity* :—Section 119 of the old Code gave an appeal against an order of rejection only in appealable cases.]

WESTROPP, C.J. :—The Civil Procedure Code of 1859, section 119, provided that no appeal should lie from a judgment passed *ex-parte* against a defendant who did not appear, or from a judgment against a plaintiff by default for non-appearance ; but it gave power to the parties to apply to the Court, by which the judgment was passed, to set aside the judgment. The concluding portion of the section is in these words : "In all cases in which the Court shall pass an order, under this section, for setting aside a judgment, the order shall be final ; but in all appealable cases, in which the Court shall reject the application, an appeal shall lie from the order of rejection to the tribunal to which the final decision of the suit would be appealable." It, therefore, appears that, although there was no appeal against the judgment, yet there was an appeal where the Court rejected an application to set aside a judgment. That was the rule as to *ex-parte* decrees generally.

Section 363 of the same Code (VIII of 1859) provided that no appeal should lie from any order passed in the course of a suit and relating thereto *prior to decree ;* but, if the decree were appealed against, any error, defect, or irregularity in any such order affecting the merits of the case, or the jurisdiction of the Court, might be set forth as a ground of objection in the memorandum of appeal. Section 364 of the same Code runs thus : " No appeal shall lie from any order passed after decree *and* relating to the execution thereof, except as is hereinbefore expressly provided." That latter section was afterwards varied by section 11 of Act XXIII of 1861.

Subsequently to the passing of the Code of 1859, the Bills of Exchange Act (V of 1866) was passed. One of the provisions of that Act (section 4) gave this Court power, under special circumstances, to set aside the decree made in a suit brought under that Act, and to give leave to the defendant to appear and to defend the suit : so that, although a defendant had not come in within seven days, as required by the Act, yet he might, under this section, appear and make his defence on the decree against him being set side.

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The Legislature in the new Code of 1877 has consolidated the provisions of the old Code of 1859 and of the summary Bill of Exchange Act (V of 1866).

In the provisions relating to the setting aside of *ex-parte* decrees, the new Code of 1877 departs from the provisions contained in the Code of 1859. This latter, by section 119, expressly prohibited appeals against *ex-parte* decrees. The former does not contain any such prohibition ; and section 540 is wide enough to sanction such appeals. Section 108 embodies a portion of section 119 of the old Code, and permits a defendant, against whom an *ex-parte* decree has been passed, to apply to the Court to set it aside ; but it contains no provision forbidding an appeal against the Court's refusal of such an application. Section 534, which is a portion of the chapter (XXXIX) of the Code of 1877 substituted for Act V of 1866, provides that the Court may, under special circumstances, set aside the decree, stay execution, and give the defendant leave to appear and defend the suit.

If the Court make an order to set aside the decree, stay execution, and give leave to the defendant to appear and defend the suit, we think the Court "affects the decision of the case," and by refusing to do so it also "affects the decision of the case," inasmuch as it thereby upholds the decree against the party applying to have it set aside. We make this observation with especial regard to section 591 to which we shall presently advert.

Section 588 deals with what may be styled immediate appeals from orders, and it specifies the cases in which such appeals are allowed, amongst which our attention has been particularly called to those mentioned in clauses *f* and *v* ; but we do not perceive how any argument can be founded on them, which ought to lead us to infer that section 591 is inapplicable to such an order made after decree as that sought to be appealed against in the present case. Section 588 also contains an express prohibition of immediate appeals from any other orders than those specified in that section. The term "immediate appeal" is not used ; but section 591 shows that such an appeal is meant, for it provides that if any decree be appealed against, any error, defect, or irregularity in such order affecting the decision of the case may be set forth as a ground of objection in the memorandum of appeal. That provision is, in

substance, the grant of an ultimate appeal against any order affecting the decision of the case, but making such ultimate appeal contemporaneous with an appeal against the decree.

It is most important to observe that the words "prior to decree," which appeared in section 363 of the old Code, are omitted from section 591 of the Code of 1877, and thus that section is left applicable to orders affecting the decision of the case, whether such orders were made before or after the decree. The words "affecting the decison of the case" are substituted for the words "affecting the merits," which appear in section 363 of the Code of 1859. This latter alteration appears to us to be rather more verbal than material.

Section 7 of Act V of 1866 rendered the provisions of the Civil Procedure Code of 1859, and the rules made under it, applicable to proceedings taken under Act V of 1866, so that a defendant, against whom an *ex-parte* decree under that Act had been passed, was entitled, under section 7, to take advantage of the provisions of section 119 of the Civil Procedure Code of 1859 and to apply to the Court to set such decree aside. If he did not succeed in his application, he had the right, under the same section, to appeal against the order of refusal. It appears to us that the object of the Legislature in omitting from section 591 of the new Code the words "*prior to decree*," which were in section 363 of the old Code, was to allow the defendant, when appealing—as we think he has a right to do—against the decree, to appeal also against the order made after the decree refusing to set the decree aside. That is probably the reason why a special provision was not made, in section 588, for an immediate appeal in cases of this kind. It would be useless to give the right to appeal against the order of refusal, unless there was also given an appeal against the decree. We have consulted our brother Sargent, and he has come to the same conclusion upon this question, which we admit to be not free from doubt and difficulty, but we think we are are giving the proper construction to the provisions of the Code. The appeal must be admitted. Costs of this motion to be costs in the appeal.

Rule absolute to admit the appeal.

Attorneys for the plaintiff :—*Messrs. Fletcher and Smith.*

Attorney for the defendant :—*Bhaishunker Nanabhoy.*

[APPELLATE CIVIL.]

Before Mr. Justice West and Mr. Justice Pinhey.

1878 July 8.

R. S. JOSHI (ORIGINAL PLAINTIFF), APPELLANT, *v.* L. B. JOSHI (ORIGINAL DEFENDANT), RESPONDENT.*

Hindu law—Mortgage—Sale—Estoppel.

The three senior members of an undivided Hindu family—the remaining member of which had disappeared—setting forth a ground of necessity, executed to the plaintiff, in November 1870, a mortgage, duly registered, of a piece of land which formed part of the family estate. Certain judgment-creditors of the absent member subsequently attached and sold his share in the said land under their decree. The plaintiff's undivided son purchased it, and in 1872 re-sold his right, title, and interest in it to the defendant's father, without disclosing the fact of his father's mortgage, but without any active fraud on the part of himself or his father to suppress the fact from the knowledge of his purchaser.

In 1874 the plaintiff obtained a decree upon his mortgage, and attached the land.

In a suit by the plaintiff to establish his right as against all the land included in his mortgage.

Held that the mortgage being, under the circumstances, a valid one, the sale of the absent son's share was subject to the lien created thereby, which lien was not disturbed by the purchase and subsequent sale of the share by the son of the mortgagee. The origin of the son's title was stated in the deed of sale to the new purchaser, who, by the fact of its being a sale of a *share*, was put upon inquiry.

The mere want of disclosure, by the plaintiff's undivided son, of his father's mortgage was not enough to create an estoppel against his father seeking to establish his claim under the mortgage.

THIS was a second appeal from the decree of Gopálráv Hari Deshmukh, Joint Judge of Thánâ, amending the decree of the Subordinate Judge of Alibág.

The following are the facts of the case:—

Anant Bhat owned a piece of land at the village of Cheul, in the Kolába Sub-Collectorate. He left seven sons, of whom three died; a fourth, named Parashrám, absconded; and the remaining three, to relieve the necessities of the family, borrowed from the plaintiff a sum of Rs. 700 on the security of a duly-registered mortgage, dated the 20th November 1870, of a piece of land which was part of the family estate.

Subsequently to the mortgage, certain judgment-creditors of Parashrám attached and sold his share in the property under

* Second Appeal No. 118 of 1878.

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their decree. The plaintiff's son purchased it, and in 1872 re-sold his right, title, and interest therein to the defendant's father, without disclosing to the latter the fact of the existence of the plaintiff's mortgage. The plaintiff and his son were united in interest.

In 1874 the plaintiff obtained a decree against the mortgagors, and attached the property.

On the application of the defendant's father to the Civil Court at Alibág, the plaintiff's attachment was removed, and the plaintiff thereupon brought this suit to establish his right to the whole piece of land.

The defendant contended that his purchase was free from the plaintiff's lien.

The Subordinate Judge of Alibág awarded the whole of the plaintiff's claim. The Joint Judge amended his decree by disallowing to the plaintiff the share of Parashrám, the absent son, for the following reason as stated in his judgment :—

"I think, as the plaintiff's son and the plaintiff are united in interest, the act of the former could not have been unknown to the latter. No notice was given to the defendant, by either, that the plaintiff had a lien on the land. The plaintiff's claim, to the extent of Parashrám's share, should, therefore, be set aside."

Pándurang Balibhadra for the appellant :—The Joint Judge was wrong in holding that the sale to the respondent's (defendant's) father was binding as against the appellant, merely because his vendor was the undivided son of the latter. The vendor not being the appellant's agent, and not having purchased or sold the property on his behalf, the sale by him cannot affect the appellant's rights as mortgagee of the entire property. The sale deed to the respondent's father having expressly described the sale to be of the right, title, and interest of the absent son Parashrám, as conveyed by the certificate of sale, and the entire property of Parashrám's family having previously been mortgaged to the appellant for payment of ancestral debts, the respondent's purchase is subject to the mortgage. There is no evidence to show that the appellant was in any way aware of the sale to the respondent's father.

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Vináyak Máhádev Pandit (with him *Máhádev Chimnáji Apte*) for the respondent :—The non-disclosure, by the plaintiff's son, of his father's lien on the property in dispute was a fraudulent act on his part ; and his father, who is united in interest with him, should not be allowed to take advantage of it.

The judgment of the Court was delivered by

WEST, J. :—The mortgage having been executed by the three senior members of a joint family, the remaining member of which had disappeared, and setting forth a ground of necessity, was presumably a valid transaction. Nothing has been adduced, in the way of evidence, to overthrow that presumption.

The sale of the one-sixth share belonging to Parashrám, the absent member, was subject to the lien thus created.

The purchase of that share by the mortgagee's son, and his sale of it to the respondent's father, did not disturb this lien. The mortgage was registered, and the father, as that important transaction shows, was managing the family affairs. If he could be identified with his son, yet the sale-deed to the respondent's father sets forth distinctly the origin of the vendor's title. It was a purchase of a share, and this should have put the new purchaser upon inquiry.

The mere fact that, under such circumstances, the mortgagee's son bought and sold a share in the property mortgaged without disclosing the existence of the mortgage, was not enough to create an estoppel against the mortgagee. If there had been any active fraud, any artifice by which the mortgagee, directly or indirectly, had prevented the purchaser from his son from making the reasonable inquiry at the registration office, the case might be different.

We reverse the decree of the Joint Judge, and restore that of the Subordinate Judge, with costs throughout on respondent.

Decree of the Joint Judge reversed, and that of the Subordinate Judge restored.

[APPELLATE CRIMINAL.]

Before Mr. Justice Kemball and Mr. Justice Pinhey.

In re MUSE ALI ADAM.*

1878. July 11.

Code of Criminal Procedure (Act X. of 1872), Section 210—Sanction—Complainant—Withdrawal—Indian Penal Code (Act XLV. of 1860), Section 183.

In cases of contempt of the lawful authority of a public servant, the complainant referred to in section 210 of the Code Criminal Procedure is the public servant whose authority has been resisted, and without whose sanction no criminal proceedings can be instituted against the offender, and not the person injured by the resistance.

THIS was a reference, under the provisions of section 296 of the Code of Criminal Procedure, by J. G. White, Magistrate of the District of Broach.

The accused person was charged, under section 183 of the Indian Penal Code, with the offence of offering resistance to the lawful authority of a public servant, by having obstructed the execution of a warrant of the Court of the Subordinate Judge at Broach. The charge was prosecuted by Muse Ali Adam, with the sanction of the Subordinate Judge, under section 470 of the Code of Criminal Procedure; but subsequently, on the representation of the said Muse Ali Adam, it was permitted to be withdrawn by the Magistrate, Second Class, of Broach, under section 210 of the Code, without any application from the Subordinate Judge. The District Magistrate was of opinion that the proper complainant in the case was the Subordinate Judge, and not Muse Ali Adam, and that the permission for the withdrawal of the prosecution was illegal.

There was no appearance on either side.

KEMBALL, J. :—The Court concurs with the opinion of the Magistrate of the District. The offence charged was one of "contempt of the lawful authority of a public servant," and no proceedings could have been instituted against the offender without the sanction of the Court whose authority had been resisted. In such a case the complainant spoken of in section 210 of the Code of Criminal Procedure must be deemed to be the Court resisted and not the person injured through the resistance. Therefore, to make the withdrawal of such a complaint as that under consideration legal

* Criminal Reference No. 83 of 1878.

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it must be based on the application alone of the Court or authority sanctioning the proceedings.

The Court annuls the order of the Subordinate Magistrate, permitting the withdrawal of the charge in this case, and directs the Magistrate to proceed with the trial and dispose of the case according to law.

Order accordingly.

Note.—See Criminal Review No. 7 of 1876. *In re* Keshav Lakshman., I. L. R. 1 Bom. 175.

[APPELLATE CIVIL.]

Before Mr. Justice Kemball and Mr. Justice Pinhey.

July 11.

SHIVLAL KHUBCHAND, APPLICANT, *v.* APAJI BHIVRAV AND OTHERS, OPPONENTS.*

Code of Civil Procedure (Act VIII. of 1859), *Section* 338—*Sureties—Extent and duration of their liabilities.*

The present applicant having taken out execution of a decree held by him, and the judgment-debtor having appealed to the District Court, the two opponents became sureties under section 338 of Act VIII. of 1859 that the judgment-debtor would "obey and fulfil all such orders and decrees as should be given against him in appeal;" and, in default of his so doing, they bound themselves "to pay jointly and severally, at the order of the Court, all such sums as the Court should, to the extent of Rs. 812-8, adjudge."

Held (Pinhey, J., *dissentiente*) that the obligation of the sureties to fulfil the decree of the Appellate Court was not confined to the first decree of that Court, but extended to the final decree which it passed upon the case being remanded by the High Court in special appeal.

THIS was an application to set aside the order of W. H. Newnham, Judge of Puna.

Ganesh Rámchandra Kirloskar for the applicant.

Shamrav Vithal for the opponents.

The facts and arguments fully appear from the following judgments:—

KEMBALL, J.:—The dispute in this case arises out of the following facts:—

*Application (Extraordinary Jurisdiction) No. 25 of 1878 under Reg. II of 1827, sec. 5, cl. 2.

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One Shivlál Khubchand obtained a decree for Rs. 650 and proportionate costs, against one Balvantráv Venáik, in the Court of the Subordinate Judge of Puna. Balvantráv appealed to the District Court, and, pending the disposal of such appeal, Shivlál applied for execution. Balvantráv thereupon prayed for its stay, and his prayer was granted, upon two persons Apáji and Venáik becoming sureties "for the due performance of the decree or order of the Appellate Court." In the said appeal the decree of the Subordinate Judge was reversed; but in the special appeal, which Sivlál took up to the High Court, the decree of the lower Appellate Court was reversed, and the cause remanded for further trial, which resulted in the District Court confirming the original decree of the Court of first instance.

Upon this, Shivlál (apparently under section 204 of Act VIII of 1859) sought execution of his decree against the sureties Apáji and Venáik. Apáji and Venáik opposed this application, and both the Subordinate and (in appeal) the District Judge rejected it, on the ground that the liability of the sureties lasted only until the District Court decided the cause the first time, the District Judge observing that "the consideration for the security bond was the staying of execution of the decree, and when the Appellate Court decided the other way, there was no more possible execution to be stayed.

Shivlál then applied to this Court for redress in the exercise of its extraordinary jurisdiction, and on the 21st February last a rule was granted against the said sureties to show cause why execution should not issue against them as prayed in the petition. The matter was argued before us on the 4th instant, both sides being represented by pleaders. And the question is,—whether the view taken by the District Judge of Puna, as to the extent and duration of the liability of the sureties, is correct?

The security bond entered into by the opponents Apáji and Venáik is, in substance and almost entirely in words, the same as the form given at page 246 of the High Court Circular Order Book. And in that they bound themselves, their heirs, and executors to the Court of the First Class Subordinate Judge, that the defendant Balvantráv, his heirs, and executors should "obey

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and fulfil all such orders and decrees as may be given against the said defendant Balvantráv in such appeal;" and, in default of Balvantráv so doing, they bound themselves, their heirs, and executors "to pay jointly and severally, at the order of the said Court, all such sums as the said Court shall, to the extent of Rs. 812-8, adjudge" against them. On the face of this bond I can see no reason for holding that the obligation of the sureties ceased immediately upon the decree of the Court of first instance being set aside, or, as the District Judge puts it, "when there was no more possible execution to be stayed." They bound themselves to carry out any decree or order the Appellate Court might give in that appeal; and the obligation of the primary debtor, which it is now sought to enforce, appears to me to be precisely that to which they, as judiciary sureties, became accessory. It is, no doubt, a correct principle that, as a surety's engagement is accessory to a principal obligation, so the extinction of the principal obligation necessarily involves that of the surety, and, therefore, wherever the principal is discharged, the surety is discharged also. But the mistake in this case seems to me to be in regarding the reversal of the first Court's decree as involving the extinction of the obligation. Having regard to section 335 of the old Procedure Code, it seems clear that the principal obligation was for the due performance of the Appellate Court's decree, and the sureties bound themselves, on behalf of the principal debtor, for the payment of the sum so ordered to be paid to the extent of a particular amount. What was the nature of the first, and as it proved, erroneous order, it is immaterial to consider. It might have rendered unnecessary the performance of the obligation, but could not, in my opinion, operate to discharge the liabilities thus undertaken. The consideration for the sureties' promise to carry out whatever decree the Appellate Court might subsequently make, was the forbearance of the said Court to presently execute the decree already obtained; and all that we have now to consider is, whether the decree, which it is sought to execute, was passed by the same Appellate Court in the same appeal. To this question I apprehend there can be but one answer.

We have been told that it would be exceedingly hard to keep the liability of the sureties hanging over their heads for an in-

definite time; but I fail to see the hardship of compelling the sureties to do that which they contracted to do. The judgment-creditor asks for nothing more than is due to him, and which he would have received long before but for the intervention of the engagement which the sureties undertook. It was not the fault of such creditor that the order for the payment of his debt was not made by the Appellate Court until after the remand by the High Court. I would reverse the orders of the Courts below, and direct that execution be had against the sureties within the limit fixed in the security bond.

PINHEY, J.:—I am unable to concur in the judgment just delivered by Kemball, J., and am of opinion that the order passed by the District Court of Puna (Newnham, J.) is right, and that therefore the rule *nisi*, issued by the Court on the 21st February last, should be discharged.

I need not repeat the facts of this case, as they are sufficiently set forth in my brother Kemball's judgment.

I am of opinion that the first decree of the Appellate Court having reversed the decree obtained by the plaintiff in the Court of first instance, the liability of the securities was thereby determined, and could not be revived without their consent.

As soon as the Appellate Court reversed the decree of the Subordinate Court there was no decree in existence which plaintiff could execute, and, therefore, the liability of the securities terminated. It is true that by special appeal to the High Court, or by application to the Appellate Court for review of judgment, the decree of the Subordinate Court might be restored; but that would be done by proceedings, of which the defendant would have notice, but the securities would have none. Therefore, I hold that the liability of the securities cannot be revived by such proceedings.

The only case in all fours with this one to which we have been referred supports the view which I take in this case.

The case of *Nárâyan Dev* v. *Gajánand Dikshit and another*[1] was cited, but it cannot be considered to govern the present case;

(1) 10 Bom. H. C. Rep. 1.

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for in *Náráyan Dev* v. *Gajánand Dikshit* the security bond had been executed under section 36 of Act XXIII. of 1861, and in giving judgment in that case the Court pointed out that there was "a marked distinction between" a security bond executed under section 36 of Act XXIII. of 1861 and a security bond executed under section 338 of Act VIII. of 1859. The security bond in the present case was executed under section 338 of Act VIII of 1859.

But there is a case in all fours with the present one in which a Division Bench of this Court passed a decision which fully supports the view which I take of this case. I refer to *Ratan Trimbak Pátil* v. *Nasarvánji Hormasji*, cited in *Náráyan Dev* v. *Gajánand Dikshit*, but not reported.

I have sent for the record of the case between *Ratan Trimbak Pátil* v. *Nasarvánji Hormasji*. In that case the judgment of the District Court of Tháná (A. Bosanquet, J.) was as follows:—

"The issue for decision is,—whether Ratan Trimbak was liable on his security bond for the amount of those mesne profits? I find that he was so liable. He became surety for the due performance of the decree or order of the Appellate Court,—that is, of this Court. Execution of the decree should not have been stayed if he had not given this security; but the bonds would have been made over to the plaintiff, who would forthwith have taken al further mesne profits derivable from them. The security had regard to the ultimate decree or order passed by the Appellate Court. The intermediate decree or order which was passed was reversed by the High Court, and must be treated as if it had never been passed.

"The security given was for the performance of the Appellate Court's decree or order, and not for the amount of damage that might be sustained by the plaintiff in consequence of the execution of the first decree obtained by heirs being stayed.

"I, therefore, hold that the surety Ratan Trimbak has been rightly held liable for the amount of the mesne profits that he has paid. I confirm the Principal Sadar Amin's order with costs."

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The case came before a Division Bench of this Court (Warden and Gibbs, JJ.) as miscellaneous special appeal No. 2 of 1869. No written judgment was recorded; but the order of the High Court states also the *ratio decidendi*. It is as follows:—

"The Court reverse the order of the Acting District Judge and of the Principal Sadar Amin of Thána, dated, respectively, the 16th June 1869 and 12th December 1868, directing execution of a decree against the said Ratan as surety, and direct that the security bond be cancelled, as it ceased to have effect immediately after the District Judge gave his decree reversing the decree of the Principal Sadar Amin, and throwing out the claim. Costs on the opponents."

If *Ratan Trimbak Pátil* v. *Nasarvánji Hormasji* was rightly decided by this Court, as I think it was, then it cannot be distinguished in principle from the case before us, and the rule which we have heard argued should be discharged.

As, however, my brother Kemball is the Senior Judge of this Division Bench, and thinks otherwise, the order of the Court will be in accordance with his opinion, and the rule will be made absolute with costs.

Rule absolute with costs.

Note.—Section 545 of the new Code of Civil Procedure (Act X. of 1877) provides that the Court may order execution to be stayed, "provided that security has been given by the applicant for the due performance of such decree or order as may *ultimately* be binding upon him."

[APPELLATE CIVIL.]

Before Mr. Justice West and Mr. Justice Pinhey.

1878. July 16.

SARUBAI KOM JITMA'L (ORIGINAL DEFENDANT), APPELLANT, *v.* BAPU NÁRHAR SOHONI (ORIGINAL PLAINTIFF), RESPONDENT.*

Easement—Light and air.

The plaintiff and defendant being owners of two adjoining houses with a common party wall between them, the former placed a window frame in an aperture in an upward extension of his part of the wall which he had erected eight years before suit, and the latter thereupon raised the wall on her side so as to cut off the supply of light and air which the plaintiff used to receive before and after the placing of the window frame.

Held that there had been no appropriation of the light and air by the plaintiff for the statutory period (twenty years) creating in him a right of easement, and entitling him to relief against the inconvenience sustained by him.

THIS was a second appeal against the decision of N. Daniell, Judge of Ahmednagar, reversing the decree of the Subordinate Judge of that place.

The facts of the case as well as the view taken by the District Judge of the litigation between the parties are stated in the following passage from his judgment:—

"The plaintiff's and defendant's houses in Nagar town are contiguous: the wall on the north side of plaintiff's house forms the wall on the south side of the defendant's house. Formerly there was an opening in the wall on the upper story, into which the plaintiff introduced a window frame; the defendant on the 25th March 1877 erected a rough brick wall on which the window frame rests, and so closed the aperture. The plaintiff sues for a removal of the block to his easement, and for an injunction to the defendant for the future.

* * * * * * * * * * *

"The plaintiff states that an aperture has existed *since* he raised two portions of wall on the top of the parapet of the old lower wall, seven or eight years ago; the space bet ween these two portions of the wall is the aperture in question. He has recently done no more than to introduce a window frame, and convert the aperture into a window. The counsel further represents that through

* Second Appeal No. 136 of 1878.

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the window his client obtained light and air for the upper apartment of the house. Before the two portions of wall were erected on the parapet, seven or eight years ago, no building existed above the parapet.

"The defendant's case is that one portion of the upper wall was erected by the plaintiff seven or eight years ago, and that the other, the eastern portion, was built one and a half or two years ago, and that the aperture has only existed for one and a half or two years. Before that the space was open.

"The easement (if the conditions of the place can be said to afford anything of the sort to the plaintiff) in the matter of air and light existed before the portions of wall were erected, and the diminution of the easement to the dimensions of the aperture or window cannot have been an encroachment on the privacy of the defendant.

"The defendant admits that the wall is joint property. For the moment assuming so much in her favour, she has no right to interfere with the course of air and light which the plaintiff has admittedly enjoyed for an indefinite period.

"I find that the defendant has, by constructing the wall immediately in front of and against the plaintiff's window, unlawfully deprived the plaintiff of the air and light he is entitled to enjoy in his residence.

"If the defendant has been injured in any way by the structure recently raised by the plaintiff, she is at liberty to prove the injury and to obtain her remedy. She has failed to show that she suffers in consequence of the alterations in the plaintiff's building."

Pándurang Balibhadra for the appellant:—No easement could commence to exist until the building itself, in respect of which it is claimed, came into existence. There was no appropriation of the light and air by the plaintiff till eight years ago, and he had consequently acquired no right of easement.

Shivshankar Govindram for the respondent:—The plaintiff has always been enjoying the same quantity of light and air through the aperture, where he has placed a window, which has made no alteration in the building.

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SARUBÁI KOM JITMÁL v. BÁPU NÁRHÁR SOHONI.

The judgment of the Court was delivered by

WEST. J. :—The District Judge says that "the easement..... in the matter of air and light existed before the portions of the wall were erected," *i. e.*, the portions between which is the window which the defendant's new structure has closed up. The light and air were there, no doubt, before the wall was built, but there was no appropriation of them, nothing done in reliance on their continued access, in accordance with the provisions of the law, which in such cases allows a right to be created by user and enjoyment as conducive to the general convenience and improvement. The appropriation began no earlier than the wall was built, which was eight years ago at most; and until the lapse of time should convert the plaintiff's actual enjoyment into a right to its continuance, the defendant had an actual right to build on a space that belonged to her. This she has done. The plaintiff in consequence sustains an inconvenience, but one of which he took the risk when he made his window without an agreement as to the defendant's use of her contiguous property. The defendant had so far the same right as the plaintiff, and could not be prevented from exercising that right to build by the mere circumstance that the plaintiff had built first.

We must, therefore, reverse the decree of the District Judge, and reject the plaintiff's claim, with costs throughout, on the respondent.

Decree reversed.

[APPELLATE CIVIL.]

Before Mr. Justice West and Mr. Justice Pinhey,

July 15. S. B. SHRINGÁRPURE (ORIGINAL PLAINTIFF), APPELLANT, *v.* S. B. PETHE (ORIGINAL DEFENDANT), RESPONDENT.*

Mortgage—Registration—Sale—Possession—Priority.

A registered mortgage without possession has priority over a subsequent registered sale and conveyance with possession.

By a duly registered deed, D mortgaged land to the plaintiff with power of sale. On default made by D the plaintiff brought a suit for a sale of the mortgaged land; but pending the suit D sold the land to the defendant, who registered his conveyance and entered into possession. The plaintiff subsequently obtained a decree, and at the execution sale became himself the purchaser. In the present suit he sought to recover possession from the defendant.

* Second Appeal No. 132 of 1878.

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Held that the plaintiff was entitled to recover. His rights as mortgagee included the right of bringing to sale the property as it subsisted at the date of the mortgage. The property having been so brought to sale, the purchaser acquired a right free from any created subsequently to the mortgage and subject to it.

THIS was an appeal from the decision of Gopalráv Hari Deshmukh, Joint Judge of Thána, reversing the decree of the Subordinate Judge of Dáhánu.

The facts of the case are as follows:—

Dharmá, Budhá, and Káná owned certain lands in the Máhim Taluka of the Thána District. Some time in the year 1864 they mortgaged these lands to Rávji Apáji, to whom the plaintiff is heir. The mortgage deed was registered on the 24th of December of that year. It did not contain any stipulation to put the lands in the possession of the mortgagee; it merely provided for the sale of the lands in the event of failure in the repayment of the sum advanced. The plaintiff in 1869 sued to enforce this provision.

On the 7th of October 1869, and while the suit just mentioned was pending, the owners sold the lands to the defendant, who got his deed of sale registered on the 10th of February 1870, and immediately entered into possession. In 1871 the plaintiff (the original mortgagee's heir) obtained a decree in the suit which had been instituted in 1869 on the mortgage, in execution of which the lands in dispute were sold by public auction on the 18th of September 1873, and the plaintiff himself became the purchaser. The certificate of sale in his favour was registered on the 12th of December 1873.

The plaintiff in this suit sought to establish his right to the lands, and to recover possession.

The defendant, without controverting any of the facts stated above, pleaded that his title, being accompanied by possession, was superior to that of the plaintiff.

The Subordinate Judge awarded a part of the claims, and rejected the rest; the Joint Judge held that the defendant's title was preferable to that of the plaintiff, whose claim was accordingly wholly rejected. The plaintiff appealed.

Yashvant Vasudev Athale for the appellant:—The plaintiff's mortgage was prior to the defendant's sale; and the defect in

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his title, in consequence of his never having had possession of the mortgaged property, was effectively supplied by the registration of his mortgage. In consequence of the mortgage the lands were always charged with the liability to be sold, and its registration was a notice to all persons who subsequently wished to deal with it. A mortgage without possession is not absolutely void, even in the Deccan—*Gopal* v. *Krishnappa*; (1) and registration cures the defect of possession which the Hindu law requires; *Hari Ramchandra* v. *Máhádaji* (2) and *Itcháram* v. *Ráiji and another*. (3) The case of *Ráiji* v. *Krishna* (4) was also cited.

Nagindás Tulsidás for the respondent:—The sale to the plaintiff was subsequent to the defendant's purchase, and was subject to it. It conveyed no right, title, or interest to the plaintiff. Registration of this sale, private though it was, was a notice to the buyer at the Court's sale; *Pándubhat* v. *Rálájí* (5) [WEST, J:—That case is different from this. The judgment, decree, and sale there deprived the original owner of the property of every interest he had in it.] At all events, the defendant should not be deprived of the lands if he is willing to pay off the plaintiff's mortgage money.

The judgment of the Court was delivered by

WEST, J.:—The plaintiff in this case is a purchaser, at an execution sale, of the interest of Dharmá and others, sold to satisfy a mortgage effected and registered in 1864. The mortgage does not stipulate for possession, but does stipulate for a sale of the property in the event, which has happened, of non-payment of the debt secured.

Before the decree on the mortgage, but apparently during the pendency of the suit, the defendant purchased the property from Dharmá and other owners by a registered conveyance, and obtained possession. This he maintained against the purchaser (the judgment-creditor) under the sale to satisfy the prior mortgage, and the present suit is brought to establish the title of the execution purchaser.

(1) 7 Bom. H. C. Rep. 60 A. C. J. (2) 8 Bom. H. C. Rep. 50.
(3) 11 Bom. H. C. Rep. 41. (4) *Ibid.* 139.
(5) See printed Judgments for 1878, page 54.

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By the mortgage in 1864 an interest in the property was conferred on the mortgagee by way of security for his advance of money, which interest became available against all subsequent purchasers or encumbrancers by the registration of the mortgage. This result was quite in accordance with the principles of the Hindu law as lately laid down in the case of *Lalubhái* v. *Bái Amrit* (1) and in the case at 2 Macn. H. L. 308. When, therefore, the defendant purchased the property, he bought it subject to the rights derogating from the full ownership of his vendor already transferred to the mortgagee. These rights were made as effectual by registration as by possession, so as to prevent their being impaired by subsequent transactions.

The rights of the mortgagee included that of bringing the whole property, as it subsisted at the time of the mortgage, to sale. It was brought to sale, and the purchaser in execution thus acquired a right free from any created subsequently to the mortgage and subject to it. The possession of the intermediate purchaser, though it might make his right, as it existed, effective, and as against strangers might be essential to its efficacy, could not make his right itself different from what it was,—a secondary and subordinate one, available only after the right of earlier creation had been satisfied. The purchaser at the execution sale, therefore, had a claim to possession superior to that of the vendee of the equity of redemption who represented the original mortgagor.

As vendee, however, it is said, and under a registered conveyance, the defendant here ought to have been made a party in the mortgagor's suit to enforce his security. It seems unlikely that he was, in fact, a purchaser, certainly not a registered purchaser, when the suit on the mortgage was instituted. Becoming a purchaser during the pendency of the suit, he ought himself to have asked to be made a party if he desired to guard his newly-acquired interest. But, apart from that, it was not incumbent on the registered mortgagee, desiring to enforce his lien, to search for subsequent encumbrancers or purchasers. It lay on them to inform him of the assignment of the equity of redemption or of the interest they had acquired. Registration of a subsequent sale did

(1) *Supra*, page 299.

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not supply the place of such notice; as the mortgagee, though he would properly look for prior encumbrances, could not be expected to keep up a constant search for those subsequent to his own, and, in the absence of notice, would properly proceed against the person *primâ facie* liable to him. And if his proceeding was right, the title acquired under it was complete so as to displace the defendant's title.

We must, therefore, reverse the decree of the Joint Judge and amend that of the Subordinate Judge by awarding to the plaintiff possession of the whole lands sought, with costs in all the Courts.

[APPELLATE CIVIL.]

Before Mr. Justice West and Mr. Justice Pinhey.

July 16.

BÁBÁJI MÁHÁDAJI (ORIGINAL DEFENDANT NO. 2), APPELLANT, *v.* KRISHNAJI DEVJI, A MINOR, BY HIS GUARDIAN SAKUBÁI (ORIGINAL PLAINTIFF), RESPONDENT.*

Hindu law—Family necessity—Manager's discretion—Sale by father of ancestral estate.

The expression "family necessity," when used to justify the sale of ancestral property, must be construed reasonably, and the head of the family and those dealing with him must be supported in transactions which, though in themselves diminishing the estate, yet prevent or tend to prevent still greater losses. A reasonable latitude must be allowed for the exercise of a manager's judgment, especially in the case of a father, though this must not be extended so far as to free the persons dealing with him from the need of all precautions where a minor son has an interest in the property.

The fact that a mortgage or a bond, to pay off which ancestral property is sold, had some time to run, is not a sufficient reason to disprove an otherwise apparent family necessity.

The Hindu law recognizes a debt contracted by the father of a family to enable him to earn a maintenance as one contracted under pressure of a family necessity.

THIS was a second appeal from the decision of S. H. Philpotts, Judge of Puna, reversing the decree of Ráv Báhádur Máhádev Govind Ránáde, Subordinate Judge, First Class, of Puna.

Krishnáji, a Hindu minor, by his guardian and mother, brought this suit to set aside the sale of a house made by his father Devji, the first defendant, to Máhádáji, the second defendant, and to ob-

* Second Appeal No. 147 of 1878.

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tain possession of half of the said house. In his plaint he alleged that the house, being ancestral propserty, belonged jointly to his father and himself, and that the sale effected by his father alone, and not for necessary family purposes, was unauthorized and invalid.

The defence of Devji (defendant No. 1), the father of the plaintiff, was that he had sold the house for necessary purposes.

Bábáji (defendant No. 2) raised the same defence, averring that the house had been sold to him to pay off a previous mortgage to two bankers Ránádè and Dèkhnè and a bond passed to himself, and also to repay a sum of Rs. 88, borrowed by the said defendant to enable him to purchase some buffaloes and set up his trade as a milkman.

The Subordinate Judge held that the sale was valid, and rejected the plaintiff''s claim. The District Judge reversed his decree on the ground that the time mentioned in the mortgage for the repayment of the loan advanced upon its security by Ránádè and Dèkhnè had not expired at the date of the sale to Máhádáji, and that consequently not even a *primâ facie* necessity for the sale had arisen. The bond to Máhádáji had not been produced before the Judge, who suspected that its production had been withheld, because the time for its payment had not arrived. With regard to the item of Rs. 88, the Judge held that the defendants had also failed to prove that any family necessity existed.

Ghanashám Nilkant Nádkarni (with him *Shántárám Náráyan*) for the appellant:—The Judge has wrongly thrown upon the defendants the *onus* of proving the existence of family necessity. Actual necessity need not be proved to validate the sale. The purchaser of ancestral property from a manager of the family to which it belongs need prove no more than that, after reasonable inquiry, he *bonâ fide* believed that the person he dealt with was a manager, and that some family necessity led to the sale. A son cannot set aside the sale of ancestral property made by his father as manager for the discharge of his debts, and oust the purchaser: *Girdháree Lall* v. *Kantoo Lall*.[1] This case was followed by this Court in *Náráyán Achárya* v. *Narso Krishna*,[2] where it was

(1) L. R. 1 In. Ap. 321. (2) I. L. R. 1 Bom. 262.

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held that the son's vested interest in ancestral estate was subject to the liability of that estate for the debts of his father and grandfather, not contracted for immoral purposes. He cited also *Adurmoni Deyi* v. *Chowdhry Sib Narain Kur*.(1)

The District Judge also erred in holding that the manager could not sell any property to liquidate a debt secured on a mortgage till the time fixed for its liquidation had expired.

Shamráv Vithal for the respondents (plaintiffs) :—There was no debt in existence which could properly be charged on the family estate. The mere existence of a liability incurred by the manager is not sufficient to make his co-parceners liable. The District Judge was right in throwing the *onus* on the purchaser to show that the sale was necessary for family purposes. In the case of *Bheknarain Singh* v. *Januk Singh*(2) the Calcutta High Court, in a suit by a mortgagee against a father and his sons to recover the mortgage debt, held that it was incumbent on the mortgagee to show for what purpose the loan had been contracted, and that that purpose justified the father in charging the property, or that the mortgagee believed *bonâ fide* that such was the case.

WEST, J. :—The suit in this case was by a minor to set aside the sale of half a house made by his father. The Subordinate Judge found that the transaction was one of a kind by which, according to the Hindu law, the minor was bound—one falling under the general principle of a sale for satisfying a family necessity. The District Judge thinks that even a *primâ facie* necessity, the belief in which held in good faith would protect the purchaser, did not exist. His reasons for this conclusion are that the mortgage, to pay on which some portion of the money was raised, still had some time to run, and that the bond to the purchaser, also, payment of which formed part of the consideration, probably had some time to run too. These are not, in our opinion, reasons sufficient to disprove an otherwise apparent necessity. It might be highly desirable, in the interests of the family, that a mortgage and a bond at high interest should be paid off, even by a sale of ancestral property, rather than allowed to grow to an overwhelming amount. The District Judge does not seem to have found any other grounds than

(1) I. L. R. 3 Calc. 1. (2) I. L. R. 2 Calc. 428.

those of an anticipation of the day of absolute necessity for payment for differing from the Subordinate Judge's view that the sale was justifiable, or, at any rate, apparently justifiable, under the circumstances; and the mere fact that the father did not wait until the debts and interest had grown to an unmanageable sum or to the whole value of the family estate, is not, we think, a sufficient reason for saying that the apparent ground of necessity was wholly unreal, or a mere invention of the father and the creditor. "Family necessity" is an expression that must receive a reasonable construction, and the head of the family and those dealing with him must, in the interest of the family itself, be supported in transactions which, though in themselves diminishing the estate, yet prevent or tend to prevent still greater losses. A reasonable latitude, too, must be allowed for the exercise of a manager's judgment, especially in the case of a father, though this must not be extended so as to free the person dealing with him from the need of all precautions where a minor son has an interest in the property. Here the circumstances, relied on by the District Judge, do not, in our opinion, seriously touch the good faith and propriety of the transaction.

As to Rs. 88, the District Judge says that no "emergent necessity" to borrow that sum was proved. It was borrowed, after the father's illness and consequent impoverishment, to buy a stock of buffaloes with which to resume his business as a milkman. This could not be called an obligation of an immoral character. On the contrary, as the debt was contracted in order to put the father once more in the way of earning a maintenance, it was created under the pressure of a family necessity which the Hindu law fully recognizes. That law does not require the father to lie down in idleness until starvation is actually at his door before parting with the family estate; it recognizes as a necessity any emergency in which plainly, and not through any course of subtle or sophistical reasoning, the proposed transaction is the only obvious means, or the obviously proper means, of averting some greater calamity, as absolute pauperism would be.

For these reasons we reverse the decree of the District Judge, and restore that of the Subordinate Judge, with all costs on respondent.

Order accordingly.

[APPELLATE CIVIL.]

Before Mr. Justice West and Mr. Justice Pinhey.

1878. July 17.

LAND MORTGAGE BANK OF INDIA, LIMITED, APPLICANT, *v.* VISHNU GOVIND PÁTANKAR, OPPONENT.*

Mortage—Decree—Sale—Right to emblements.

On the 14th of July 1876, B obtained a decree against D, directing D to pay the amount advanced upon a mortgage of D's lands within six months from the date of decree, or, in default of payment, the lands to be sold, with liberty to B to bid at the sale. Default having been made, the lands were sold on the 21st of June 1877, and B became the purchaser. At the time of the sale the lands were in the occupation of D's tenants under an agreement to give to D a moiety of the crops. On the 11th December 1877, P, another judgment-creditor of D, attached the crops on those lands which had been cut and stored by D's tenants since the date of the sale.

Held that by the sale to B, all right, title, and interest of D, including his right to the moiety of the crops in the hands of his tenants, passed to B, and no residual right remained in D on which P's execution could operate, the crops not having been actually carried away and appropriated by D.

THIS was an application under the extraordinary civil jurisdiction, praying for a reversal of an order of Ráv Sáheb Mádhavráv Jánoji, Subordinate Judge of Kalyán.

The facts are as follows:—

In a suit between the Land Mortgage Bank of India, Limited, as plaintiffs and Rámchandra Govind Dátár as defendant the High Court, in its ordinary original civil jurisdiction, passed a decree on the 14th of July 1876, directing that certain lands in the district of Tháná, held to have been mortgaged by the defendant to the plaintiff, should be sold by the Sheriff of Bombay at the expiration of six months from the date of the said decree in the event of default in payment of the amount of that decree. Liberty was given to the plaintiffs to bid at the sale. Default having been made, the lands were put up to sale, and the plaintiffs became the purchasers on the 21st of June 1877. On the 21st September following the High Court granted to the plaintiffs a certificate of their having become such purchasers. The plaintiffs allege that, in pursuance of their decree and certificate, possession was given of the lands to them on the 10th October 1877 by Dátár. At and after this

* Application (Extraordinary Jurisdiction) No. 60 of 1878 under Reg. II of 1877, sec. 5, cl. 2.

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date part of the crops growing on the lands were cut, gathered, and stored by the tenants of Dátár at various places on the property, there being an agreement between Dátár and his tenants to give to the former a moiety of these crops. On the 11th of December 1877, Vishnu Govind Pátankar, another judgment-creditor of Dátár, attached the said crops under an attachment issued out of the Court of the Subordinate Judge of Kalyán. The Land Mortgage Bank applied to that Court to have the attachment removed, alleging that, since their sale and more especially their possession of the lands on the 10th of October 1877, they had become the owners of the lands together with the crops. The Subordinate Judge found, as a fact, that the Bank had not possession of the lands on that day, and rejecting their application confirmed Pátankar's attachment on the 5th of March 1878.

A rule *nisi* was granted on the 5th of May 1878 to show cause why the order of the Subordinate Judge should not be reversed or varied.

Pigot (*Lynch* with him) for the applicant.

Macpherson (*J. V. Athale* with him) for the opponent.

The arguments sufficiently appear from the following judgment of the Court delivered by

WEST, J.:—The contention of the applicant in this case is that, whether he had or had not acquired actual possession under his purchase of June 1877, the ownership of the land had, in fact, passed to him, and that being owner of the land he was owner of the landlord's moiety of the crop as it was cut, so that there was nothing of the mortgagor's (Dátár's) which could be attached by Pátankar in execution of his old money decree against Dátár. For the opponent it is said that Dátár, being allowed to remain in possession after the time limited for payment of the mortgage money and even after the sale, was justified in cultivating the land directly or by the mediation of his tenants; that he thus became entitled to the emblements, notwithstanding an intermediate sale followed even by his dispossession as to the land; and that the crops being thus his property, or so far as they were his property in the hands of the tenants, were subject to his creditor Pátankar's attachment.

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No case has been cited to us in which the ordinary rule as to emblements has been applied to the case of a mortgagor retaining possession after the time had expired which had been allowed to him for payment of the sum due on account of the mortgage. His position, being that of a person acquainted with the imperfection of his title, and one entirely of his own choosing, seems to us to fall under quite a different principle from that of the tenant-at-will cultivating on a reasonable expectation of reaping what he has sown, or of a holder whose right is put an end to by a wholly uncertain event. If, therefore, possession was acquired under his execution purchase by the applicant, there was, we think, no residual right left to Dátár on which Pátankar's execution could operate.

The Subordinate Judge has proceeded, however, on the ground that the applicant had not, in fact, acquired possession. It is now stated that the lands were in part cultivated by Dátár himself; but the averment in the applicant's affidavit, that they were wholly let to tenants, is supported by the language of the Subordinate Judge, and has not been contradicted by any counter-averment. We must take it, therefore, as a fact that the lands were occupied by tenants, who appear to have held on terms of giving to Dátár one moiety of the crops. This right vested in Dátár, it was contended, was separable from his ownership of the land; but, though it may be conceived of as separate, it was, in our opinion, distinctly a part of Dátár's right, title, and interest which were sold in execution. Rights subsist only as between persons, and a relation between a landlord and tenant is a right in the land to which it relates vested in him who may benefit by it. The applicant had, therefore, acquired the right to one-half of the crops by his purchase. But it is said by the Subordinate Judge he had left this right, by not taking possession, in the enjoyment of Dátár; and, notwithstanding any personal obligations subsisting between them, Dátár became possessor of a moiety of the crops at the moment of their severance with an ownership that would enable him to sell them, and, therefore, enabled his creditor to seize them.

As to this, it appears to us that while the crops were in the hands of the tenants they were held subject to a lien for the rent or share due to the landlord Dátár. But this lien, arising entirely from

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his position towards the tenants in relation to the land, was a part of his right, title, and interest in the land which had passed by his purchase to the applicant, and could be asserted by him so long as the crops had not been carried away, or come into the possession of purchasers for value from the tenants or from Dátár. Dátár, though tenants without notice might have been exonerated by delivery of the landlord's share to him, was not really owner of the crops, as they had not been taken away by him, and an appropriation in the fullest sense was necessary to make them, or a moiety of them, his, in spite of the right, as against him, vested in the Land Mortgage Bank. The Bank having, in virtue of its proprietorship, succeeded to the lien before it had ceased to be a lien, had not done any thing which by deceiving or misleading Pátankar had given him a right to take the property as if it had really been that of Dátár.

We must, therefore, set aside the order of the Subordinate Judge, and direct the removal of Pátankar's attachment, with all costs on opponent.

Rule made absolute.

[APPELLATE CIVIL.]

Before Mr. Justice West and Mr. Justice Pinhey.

July 23.

V. K. GUJAR (ORIGINAL PLAINTIFF), APPELLANT, *v.* V. D. BARVE (ORIGINAL DEFENDANT), RESPONDENT.*

Limitation Act (IX. of 1871), *Schedule II, Article* 158—*Application for restitution by a person dispossessed—Mode of computing period of limitation.*

In calculating the period of limitation prescribed in schedule II of Act IX. of 1871 for applications as well as for suits and appeals, the day on which the order or decree appealed against was made should be excluded.

Consequently, where a person, having been dispossessed of property held by him under a mortgage on the 14th of December 1875, applied on the 14th of January 1876 for restitution, the 13th having been a Court holiday, it was held that his application was within the limitation of thirty days prescribed by article 158, schedule II of Act IX. of 1871.

THIS was an appeal from the decision of H. J. Parsons, Acting Judge of Ratnágiri, confirming the order of the Second Class Subordinate Judge of Chiplun.

* Second Appeal No. 141 of 1878.

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V. K. GUJAR v. V. D. BARVE.

Mánekshâh Jehangirshâh for the appellant.

Shivshankar Govindrâm for the respondent.

The facts, arguments, and authorities cited appear from the following judgment of the Court delivered by

WEST, J.:—The plaintiff Vithu, having been dispossessed of property held by him under a mortgage on the 14th December 1875, applied on the 14th January 1876 for restitution. The 13th having been a Court holiday, the question is,—whether the period of limitation expired on the 12th January 1876, so as to bar an application which but for the holiday might have been made on the 13th?

According to the rule in the Code of Civil Procedure, Act VIII. of 1859, section 230, a person dispossessed "might apply to the Court within one month from the date of such dispossession." These words, it was ruled in *Dádu* v. *Bálgoudá*, (1) give to the "applicant a clear month.....exclusive of the day on which he was dispossessed, in which to make his application." In the Limitation Act, IX. of 1871, it is said (section 4) that every "application made after the period prescribed therefor.....shall be dismissed." And in schedule II, article 158, it is provided that in a case of dispossession and an application by the person dispossessed the "period of limitation" shall be "thirty days," and the time when the period begins to run shall be "the date of the dispossession." Section 13 of the Act says that "in computing the period of limitation provided for any suit the day on which the right to sue accrued shall be excluded." For an appeal the day on which judgment was delivered is excluded. The District Judge has thought that the express exclusion, in these instances, of the first day on which the right existed, implies its inclusion in other cases, and he refers to the decision of *Nundo Coomar Mookerjee* v. *Issur Chunder Bhattacharjee*, (2) a case of an application for execution on the day three years after decree, as supporting his view. The more recent case of *Dhonessur Kooer* v. *Roy Gooder Sahoy*, (3) however, adopts a different construction, and with reference to an application for execution determines that the day on which a

(1) 5 Bom. H. C. Rep. 39 A. C. J. (2) 12 B. L. R. 9 Appx.
(3) I. L. R. 2 Calc. 336.

previous application was made is to be excluded in computing the period under schedule II, article 167. If we compare the language of section 13, already quoted, with the headings of the columns defining the terms for suits in schedule II, we find that the "time when period begins to run" being fixed as "the date of the judgment" or other proceeding or transaction, was not by the Legislature thought inconsistent with the exclusion from the reckoning of the particular day on which the right to sue accrued. The result is to allow, where a limitation of three years is prescribed, a suit to be brought on the 3rd May 1876, on a cause of action that arose on the 3rd May 1873, and we may regard that *primâ facie* discrepancy rather as a matter of interpretation than of contradiction, or as a special rule made only for particular cases. Supposing the limitation prescribed had been one day, we think it would be unreasonable to say that for a dispossession on the 4th the application could not be received on the 5th of the month, or that if the time prescribed had been two days, the application could not be received on the 6th. If this reasoning be extended to longer periods, it will follow that a limitation of thirty days means that the thing to be done—as, for instance, making an application—must be done, when the cause of application arose in June, on the same day of July, and when it arose in December, on the day before the same day of January. Such a construction appears to us not only the more liberal but the more reasonable one, and it is supported by the latest decision of the High Court at Calcutta. What the Act says is that applications shall be dismissed which are made after the period of limitation,—that is, after it has expired, and thirty days beginning on the 14th December extend into the 13th January. If, therefore, the business part of the day at each end of the time be regarded as integral, the application in this case was or would have been made, not after the period of limitation, but coincidently with the ending of that period. And it is now a received principle that when a certain number of days are allowed for doing any act, the whole of the day to which the computation reaches is available to the person thus limited: see *Lester* v. *Garland*,(1) *Mootham* v. *Waskett*,(2) *Robinson* v. *Wadding-*

(1) 15 Ves. Jun. 248. (2) 1 Mer. 243.

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ton,[1] *Weeks* v. *Wray*.[2] We must, therefore, reverse the judgment of the lower Court, and direct that the case be disposed of on its merits. Costs to follow the final decision.

Decree reversed and case remanded.

(1) 18 L. J. Q. B. 250. (2) L. R. 3 Q. B. 212.

[APPELLATE CIVIL.]

Before Mr. Justice Melvill and Mr. Justice Kemball.

April 24.

KALLAPÁ BIN GIRMALLAPÁ (ORIGINAL PLAINTIFF), APPELLANT, *v.* VENKATESH VINAYAK (ORIGINAL DEFENDANT), RESPONDENT.*

Code of Civil Procedure (Act VIII. of 1859), *Section* 269—*Undivided Hindu family—Attachment and sale of the interest of one of the co-parceners in an undivided estate—Partition—Possession.*

When the defendant is in possession by virtue of an order under section 269 of Act VIII. of 1859, the plaintiff can only succeed on the strength of his own title.

K and R, two out of five undivided Hindu brothers, sued V (a purchaser at an execution sale of the interest of one of the brothers other than K and R) for the recovery of certain land of which V had obtained possession under section 269 of Act VIII. of 1859. The lower Courts awarded two-fifths of the land to K and R as being the amount of their share in the land.

Held by the High Court that the decree could not be maintained, as K and R, being two of several co-parceners in undivided property, could not say that they were entitled to a specific share in any portion of that property. They might have sued for a general partition, or for a decree declaring them entitled to joint possession with V.

Bábáji v. *Vasudev* (1) followed.

A purchaser at a Court's sale ought not to be put in exclusive possession of the whole undivided land by virtue of a decree against one co parcener only.

THIS was a second appeal from the decision of C. H. Shaw, District Judge of Belgaum, in cross appeals Nos. 168 and 170 of 1876, affirming the decree of A. M. Cantem, First Class Subordinate Judge of the same place, in original suit No. 1051 of 1874.

Kallápá and his brother Rachappá sued to recover possession of a field survey No. 711, which consisted partly of *judi* land and partly of *sirkari* land. They alleged in their plaint that they got the land at a partition of property made between them and their

* Second Appeal No. 11 of 1878.

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three brothers, Sidlingápá, Shivlingápá, and Dánápá, on the 17th August 1872, and that the defendant, Venkatesh, as a purchaser, at a Court's sale, of the interest of Shivlingápá, obtained possession of the land in dispute by an order of Court under section 269 of Act VIII. of 1859. Venkatesh denied that there had been any partition, and alleged that the land was sold in execution of a decree against Shivlingápá for debts which he had contracted for family purposes. Both the lower Courts found that the plaintiffs had failed to prove the partition alleged by them, and that the execution sale was limited only to the *sirkari* portion of the land, and did not include the *judi* portion. They, therefore, made a decree in the plaintiff's favour for the whole of the *judi* land and for two-fifths of the *sirkari* land, on the ground that they (plaintiffs), as two out of five brothers, were entitled to no greater share in the land. Kallápá alone appeared in the District and High Courts, Racháppá having died.

Ghanashám Nilkanth Nádkarni, for the appellant:—The respondent purchased at the Court's sale only the right, title, and interest of Shivlingápá, one of the five brothers. The lower Courts, therefore, were wrong in allowing him to retain more than one-fifth of the joint property. Again, the land in dispute being undivided family property, as found by the Courts below, the respondent, as purchaser of the interest of one of the co-parceners, ought not to have been allowed to take possession of a particular share before the same was adjudged to him at a partition of the whole property. The appellant, at all events, was entitled to a joint possession of the property with the respondent, as ruled in *Máhábaláya* v. *Timaya*[1] and *Bábáji* v. *Vásudev*.[2]

K. T. Telang (with him *V. M. Pandit*) for the respondent:—The appellant's claim ought to be dismissed, because he did not prove his case as set forth in the plaint.

MELVILL, J.:—The defendant is in possession by virtue of an order under section 269 of Act VIII. of 1859, and the plaintiffs, therefore, could only succeed on the strength of their own title. They failed to make out the case stated in their plaint, viz., that the property in dispute came to them on partition. The District

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Judge, however, awarded them two-fifths of the property, on the ground that that constitutes the amount of their share in the family property. This decree cannot be maintained, as the plaintiffs, being two of several co-parceners in undivided property, could not say that they were entitled to a specific share in any portion of that property. They might have sued for a general partition, or they might have asked for a decree declaring them entitled to joint possession with the defendant. The question is, whether in the present case we should give the appellant (the other plaintiff being dead) a decree for joint possession, or leave him to his remedy by another suit? Having set up a false case, he is not entitled to much consideration; but, on the other hand, it must be borne in mind that the defendant ought not to have been put in exclusive possession of the whole land by virtue of a decree against one co-parcener, and also that a suit for joint possession would probably now be time-barred. For these reasons we determine to follow the precedent in *Bábáji* v. *Vásudev*,[1] and to give the appellant a decree for joint possession, leaving the extent of his interest in the property to be determined, if necessary, by a future suit.

The decree of the District Judge is reversed, and in lieu thereof this Court makes a decree, declaring that the plaintiff Kallápá is entitled to sole possession of the *judi* land (regarding which no appeal has been made) and joint possession with the defendant Venkatesh of the *sirkari* land in the plaint mentioned. The parties to bear their own costs throughout.

Order accordingly.

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ADMINISTRATION.] *Semble* that the rule followed by the Courts of Equity in England, whereby, notwithstanding the provisions of the Statutes of Limitation, the share of one of the next-of-kin in the estate of an intestate while in the hands of the administrator is liable for a debt due by the next-of-kin to the deceased, though barred at the date of the death of the latter, is to be applied in the Courts of British India. The rule laid down in *Graham* v. *Londonderry* (3 Atk. 393) with regard to a husband's rights over ornaments given to his wife by her father, applied to Pársis.

DHANJIBHAI BOMANJI GUGRA'T *v.* NAVAZEA'I 75

——————COSTS OF APPLICATION FOR LETTERS OF—An applicant for letters of administration to the estate of a widow, having concealed the existence and claims of which he was aware of the relatives of the deceased husband of the widow, on the application being dismissed was ordered to pay the costs of the application and of the caveats entered by some of the relatives of the deceased husband.

JAIKISONDAS GOPALDAS v. HARKISONDAS 9

ADOPTION—*Motive—Contract to settle—Specific performance—Alienation of property by widow.*]—It is not a necessary consequence of the circumstance that the spiritual motive for adoption, which exists amongst the higher castes of Hindus, has no influence upon the *Talabda Koli* caste, that its members may not lawfully adopt.

Where a member of the *Talabda Koli* caste of Hindus, by an express promise to settle his property upon the boy, induced the

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parents of the defendant to give him their son in adoption, but died without having executed such settlement,

Held that the equity to compel the heir and legal representative of the adoptive father specifically to perform his contract, survived; and the property in the hands of his widow was bound by that contract.

Therefore, when the widow of the adoptive father, nearly thirty years after his death, gave effect to his undertaking by executing a deed of gift of his property in her hands in favour of the adopted son,

Held that such alienation was valid as against the next heir by blood of the adoptive father, and he could not, on the death of the widow, avail himself of the plea of limitation which she had waived.

The nature of a Hindu widow's estate in immoveable property considered.

BHALA' NA'HA'NA' *v.* PARBHU HARI 67

ADOPTION, COMPETENCY OF A WIFE TO GIVE IN—*Hindu Law—Conditional Adoption—Non-fulfilment of a Condition—Mistake of Fact.*] According to the Hindu law prevailing in the Bombay Presidency, a wife is not competent to give her son in adoption against the will, express or implied, of her husband, the father of that son, or under circumstances from which the husband's dissent can be inferred.

Where the natural father of the son given in adoption wrote to the adoptive mother, a widow, giving his consent to the adoption on certain conditions,

Held that a non-fulfilment of one of the conditions rendered the adoption invalid, notwithstanding that the condition was unnecessary, and imposed in consequence of a mistake as to the necessity for the assent of Government to the adoption.

RANGUBA'I *v.* BHA'GIRTHIBA'I 377

———NON-RECOGNITION OF, BY CIVIL COURT—*Bombay Act II of* 1863, *s.* 6, *cl.* 2—*Inám Commissioner's Decision—Act XI of* 1852.] The provision in Bombay Act II of 1863, s. 6, cl. 2, as to the non-recognition of adoption by any Civil Court, relates only to the question of the assessability of lands when raised between Government and a claimant of exemption.

It is not open to a party to rely upon a provision, of which Government only is entitled to take advantage.

In an enquiry under Act XI of 1852 the *Inám* Commissioner, on the 30th January 1865, decided that a certain *inám* village should be continued to the male descendants of the original grantee:—*Held* that the decision of the *Inám* Commissioner was only intended to regulate the duration of the exemption of the *inám* village from assessment, and not to regulate the enjoyment of it as between the heirs of the original grantee.

VASUDEV ANANT *v.* RA'MKRISHNA AND SHIVRA'M NA'RA'YAN. 529

ADVANCEMENT AMONG PA'RSIS.] In excluding by s. 8 of the Pársi Succession Act, from application to Pársis, s. 42 of the Indian Succession Act, which repeals the English rule as to advancement contained in the Statute of Distribution, s. 5, it was not the intention of the Legislature to preserve the last-mentioned rule in force for the Pársi community.

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ADVERSE POSSESSION 388
See LIMITATION ACT.

ANCESTRAL PROPERTY—*Liability of undivided Hindu for the debts of his deceased brother.*] P, an undivided Hindu co-parcener, died on the 7th August 1874, leaving him surviving a brother C and a son N. N. subsequently died on the 2nd July 1875. In a suit brought by plaintiff against C on a bond executed by P as surety for one B,

Held that the family property, which on N's death became vested by survivorship in C, was not in his hands liable for the separate debts of P or N.

NARSINBHAT BIN BA'PUBHAT *v.* CHENA'PA' BIN NINGA'PA' ... 479

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ANCIENT LIGHTS—*Obstruction—Notice—Delay—Acquiescence—Mandatory Injunction—Damages—Demolition of Building—Professional Assistance.*] The re-erection of his house by the defendant, notwithstanding notice from the plaintiff, so as to darken some of the principal rooms of the plaintiff's house, making them unfit for occupation during the day without artificial light, is an injury which cannot be adequately redressed by an award of damages, and against which the Court will grant relief by issuing a mandatory injunction, directing the defendant to pull down so much of the house as is necessary to stop the injury.

The probability of the defendant suffering a greater loss by the demolition of his house than the plaintiff, if his claim could be reduced to money, would suffer by being awarded a money compensation, is no ground for depriving the plaintiff of a mandatory injunction in his favour, except under special circumstances.

To determine what demolition of the house is necessary, the Court executing the decree was directed to employ a professional man agreed on by the parties if they could agree, or nominated by the Court if they could not.

Circumstances constituting delay and acquiescence discussed.

JAMNA'DA'S SHANKARLA'L *v.* ATMA'RA'M HARJIVAN ... 133

APPEAL, ABATEMENT OF—*Death of Appellant.*] The Code of Criminal Procedure gives no right to the heir, devisee, executor, or any other representative of a deceased convict, to lodge an appeal, or continue and prosecute an appeal already lodged.

(*Kemball, J., diss.*)—The appeal lodged by a convict abates on his death.

The High Court, nevertheless, may call for and examine the record of the case with a view to revision and rectification, and may make such order thereon as it may consider just.

IMPERATRIX *v.* DONGAJI ANDAJI 564

————RIGHT OF.] There is no appeal against the order of a District Judge fixing the amount of the court fee chargeable on a plaint.

The right of appeal to which the plaintiff might have been entitled under ss. 31 to 36 of Act VIII of 1859, has been taken away by s. 12, cl. 1 of the Court-Fees Act (VII of 1870).

NA'RA'YAN MA'DHAVRAV NAIK *v.* THE COLLECTOR OF THA'NA'. 145

————*Effect of Death of Appellant.*] A sued B in the Court of first instance, and obtained a decree declaring A's right to a house.

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The District Court, in appeal, reversed this decree and rejected A's claim. The High Court reversed the decree of the District Court, and remanded the appeal. The District Court, on remand, made a decree confirming the original decree of the Court of first instance in A's favour. Subsequently to the last-mentioned decree of the District Court, B sold the house to C. B then preferred a special appeal to the High Court, but died before it was heard.

Held, under Act VIII of 1859, that C could not carry on the special appeal after B's death.

MORESHWAR BA'PUJI PHA'TAK *v.* KUSHA'BA' SHANKROJI ... 248

APPEAL, RIGHT OF—*Act X of* 1877, *s.* 244.] There is no appeal against an order, made under s. 244 of the Code of Civil Procedure (X of 1877) determining the questions between the parties to a suit as to the amount of mesne profits recovered by the plaintiff subsequently to the decree and as to the amount payable on account of the costs of the execution of that decree.

DALPATBHAI BHAGUBHAI *v.* AMARSANG KHEMABAI 553

APPEAL AGAINST ORDER REFUSING TO SET ASIDE AN EX-PARTE DECREE, RIGHT OF 644

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ARREST, POWER OF COURTS OF SMALL CAUSES TO ISSUE WARRANTS OF.] A Court of Small Causes may issue a warrant for the arrest of a person residing in another district, but not if he resides within the same district in which the Court is situate, but outside its local jurisdiction.

CHUNILA'L SOBHA'RA'M *v.* PURBHUDA'S KURSANDAS ... 560

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BONDS, ATTACHMENT AND SALE OF.] Under the provisions of s. 268 of the Code of Civil Procedure (Act X of 1877) bonds cannot be sold till the end of six months from the date of attachment.

A Court of Small Causes cannot appoint a receiver. Bonds, therefore, on which recovery will be time-barred before the date on which a sale can legally be made, cannot be made available for satisfaction of the judgment-creditor's debt.

NURSINGDA'S RUGHUNATHDA'S *v.* TULSIRA'M BIN DOULATRA'M... 558

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CAUSE OF ACTION—*Disturbance of office* 470

See DISTURBANCE OF OFFICE.

———*Obstruction to a public road* 457

See NUISANCE.

———*Right to fish in the Sea.*] Members of the public, exercising the common right to fish in the sea, are bound to exercise that right in a fair and reasonable manner and not so as to impede others from doing the same; and conduct which prevents another from a fair exercise of his equal right, if injury thereby results to him, is actionable.

BA'BAN MAYACHA' *v.* NA'GU SHRA'VUCHA' 19, 75

———*Suit to vindicate right to a mere dignity.*] Plaintiff sued for a declaration of his right to take a cupola to a certain temple and to place it upon the car of the idol, and to take a

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nandicola (bamboo) with tom-toms from his house to the temple, and to offer the first cocoanut to the idol at the annual festival held in honour of a certain Lingáyet saint.

Held that the suit was not maintainable, as it was brought to vindicate plaintiff's right, not to an office, but to a mere dignity unconnected with any fees, profits, or emoluments.

SANGA'PA' BIN BASLINGA'PA' *v.* GANGA'PA' BIN NIRANJA'PA'. 476

CAUSE OF ACTION, SPLITTING—*Tradesman's Account—Act IX of 1850, s. 34—Small Cause Court Jurisdiction.*] A tradesman cannot, by keeping separate accounts of his dealings with a customer, split his cause of action so as to bring his suit within the jurisdiction of a Small Cause Court in the Presidency towns.

CASSUM JOOMA *v.* THUCKER LILA'DHUR KISSOWJEE ... 570

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CIVIL PROCEDURE CODE (ACT VIII OF 1859), SS. 26 & 32 ... 120

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———————————*Appeal, Right of—Court-Fees Act (VII of 1870), ss. 29, 31 & 36.*] There is no appeal against the order of a District Judge fixing the amount of the court fee chargeable on a plaint.

The right of appeal to which the plaintiff might have been entitled under ss. 31 and 36 of Act VIII of 1859 has been taken away by s. 12, cl. I of the Court-Fees Act (VII of 1870).

NA'RA'YAN MA'DHAVRA'V *v.* THE COLLECTOR OF THA'NA' ... 145

——————————— s. 73—*Act XXIII of 1861, s. 11—Conveyance subsequent to a decree in appeal—Death of the Party executing the conveyance—Right of the Purchaser to carry on a special appeal.*] A sued B in the Court of first instance, and obtained a decree declaring A's right to a house. The District Court, in appeal, reversed this decree, and rejected A's claim. The High Court reversed the decree of the District Court, and remanded the appeal. The District Court, on remand, made a decree confirming the original decree of the Court of first instance in A's favour. Subsequently to the last-mentioned decree of the District Court, B sold the house to C. B then preferred a special appeal to the High Court, but died before it was heard.

Held, under Act VIII of 1859, that C could not carry on the special appeal after B's death.

MORESHWAR BA'PUJI PHA'TAK *v.* KUSHA'BA SHANKROJI ... 248

——————————— ss. 212, 249, 252, 256, 258. *Execution sale—right to recover purchase money.*] A purchaser of property, whether immoveable or moveable, at sale in execution of a decree under the Code of Civil Procedure, 1859, held in accordance with the provisions of that Code, has no right to recover his purchase-money, though it may turn out that the right, title and interest of the execution-debtor was nothing at all, unless the sale itself be set aside, and the sale will not be set aside by reason merely of the defect or absence of title in the thing sold on the part of the execution-debtor; but if there is an express assertion that the goods sold are the property of the execution-debtor, the sheriff and the execution-creditor are bound by such warranty, to the extent, at least, that that one of them, in whose hands the purchase-money is, is bound to restore it to the purchaser, if the purchaser has not got that for which he paid.

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Section 258 of Act VIII of 1859 applies wherever a sale is set aside, whether for irregularity in publishing or conducting a sale, or for other grounds; and, though the right of the purchaser to recover back his purchase-money, in case of the sale being set aside, is, by that Act, given expressly only where the sale is of immoveable property, yet the same consequence would follow where a sale of moveable property in execution has been set aside.

Where, therefore, certain shares were attached by the execution-creditor as the property of the execution-debtor, and were afterwards sold in execution by the sheriff, and the execution orders and warrants and the sheriff's proclamation of sale contained assertions of interest of the execution-debtor in these shares, whereas he had no such interest,

Held that the purchaser at the execution-sale was entitled to have the sale set aside, and his purchase-money returned to him; but the sheriff's liability to the purchaser in such a case ceases so soon as he has paid over the proceeds of the sale to the execution-creditor, and the purchaser's remedy thereafter is against the execution-creditor only.

FRA'MJI BESANJI DASTUR *v.* HORMASJI PESTANJI FRA'MJI ... 258

CIVIL PROCEDURE CODE (ACT VIII OF 1859) 254—*Re-sale in Execution of a Decree—Right of Judgment-creditor.*] Where property has been sold under a decree, and the purchaser at the execution-sale has made default in paying the purchase-money, the remedy of the judgment-creditor is not limited by s. 254 of Act VIII of 1859 to a suit against the defaulting purchaser. He is entitled to recover the balance of his debt from his judgment-debtor, who may, perhaps, have his remedy against the defaulting purchaser.

ANANDRA'V BA'PUJI *v.* SHEKH BA'BA' 562

——— s. 269—*Undivided Hindu Family—Attachment and Sale of the Interest of one of the Co-parceners in the undivided Estate—Partition—Possession.*] When the defendant is in possession by virtue of an order under s. 269 of Act VIII of 1859, the plaintiff can only succeed on the strength of his own title.

K and R, two out of five undivided Hindu brothers, sued V (a purchaser at an execution-sale of the interest of one of the brothers other than K and R) for the recovery of certain land of which V had obtained possession under s. 269 of Act VIII of 1859. The lower Courts awarded two-fifths of the land to K and R as being the amount of their share in the land.

Held by the High Court that the decree could not be maintained, as K and R, being two of several co-parceners in undivided property, could not say that they were entitled to a specific share in any portion of that property. They might have sued for a general partition, or for a decree declaring them entitled to joint possession with V.

A purchaser at a Court's sale ought not to be put in exclusive possession of the whole undivided land by virtue of a decree against one co-parcener only.

KALLA'PA' *v.* VENKATESH VINAYAK 676

——— s. 338—*Sureties—Extent and Duration of their Liabilities.*] A decree-holder having taken out execution of a decree held by him, and the judgment-debtor having appealed to the District Court, the two

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opponents became sureties under s. 338 of Act VIII of 1859 that the judgment-debtor would "obey and fulfil all such orders and decrees as should be given against him in appeal;" and, in default of his so doing, they bound themselves "to pay jointly and severally, at the order of the Court, all such sums as the Court should, to the extent of Rs. 812-8, adjudge."

Held (Pinhey, J., *diss.*) that the obligation of the sureties to fulfil the decree of the Appellate Court was not confined to the first decree of that Court, but extended to the final decree which it passed upon the case being remanded by the High Court in special appeal.

SHIVLA'L KHUBCHAND *v.* APA'JI BHIVRA'V 654

CIVIL PROCEDURE CODE (ACT X OF 1877), ss. 2, 244, 540, 558—*Appeal—Execution of a Decree—Judicial Proceeding.*] There is no appeal against an order made under s. 244 of the Code of Civil Procedure (Act X of 1877) determining questions between the parties to a suit as to the amount of mesne profits recovered by the plaintiff subsequently to the decree, and as to the amount payable on account of the costs of execution of that decree.

The term "judicial proceeding," as used in s. 2 of the Code of Civil Procedure (Act X of 1877), must be understood to mean a judicial proceeding of the same nature as a suit or such proceedings as are referred to in ss. 333, 522, 526 and 531 of the Code. The definition given in the Code of Criminal Procedure (Act X of 1872) is not applicable.

DALPATBHA'I BHA'GUBHA'I *v.* AMARSANG KHEMA'BHA'I ... 553

——————————s. 5; ch. x, ss. 344 to 360 AND SCH. II—*Jurisdiction—Small Cause Court—Insolvency.*] The effect of s. 5 of the Code of Civil Procedure (Act X of 1877), coupled with the second schedule to that Act, is to render the whole of ch. xx (relating to insolvent debtors) of the Code, including s. 360, inapplicable to Courts of Small Causes in the mofussal, notwithstanding the words "any Court other than a District Court" and "any Court situate in his district" which occur in that section. Consequently, the Government Resolution No. 2133, of the 3rd of April 1878, investing the Judge of the Court of Small Causes at Ahmedabad with powers, under the said chapter, to adjudicate in insolvency matters, is *ultra vires*, and invalid.

LALLU GANESH *v.* RANCHHOD KAHA'NDA'S 641

——————————ss. 3 & 223 to 343 and ACT VIII OF 1859—ss. 273 to 281—*Construction—Retrospective Enactment—Decree—Execution—Imprisonment for Debt—Discharge from Arrest.*] *Held*, by a majority of the Full Bench, (Sargent and Bayley, JJ., dissenting,) that a judgment-debtor, imprisoned in satisfaction of the decree against him under Act VIII of 1859, is not entitled, under Act X of 1877, to be released on the coming into operation of the latter Act, if he have then been imprisoned for more than six months but less than two years.

Per WESTROPP, C.J.—The judgment-creditor has, under Act VIII of 1859, the right (subject to be divested only under the circumstances stated) to have such judgment-debtor as the above detained in custody for two years, unless he in the meantime fully satisfy the decree. Chapter xix of Act X of 1877, sub-division I, is essentially prospective throughout. Section 342 must, therefore, be construed as relating only to future imprisonment, consequent on arrests to be made under Act X of 1877. There is not in

ch. xix of that Act any trace of an intention on the part of the Legislature to deal with imprisonment commenced before the coming into force of the Act. Notwithstanding the repeal of Act VIII of 1859 by Act X of 1877, Act I of 1868, s. 6, saves the committal under Act VIII of 1859, while that Act was in force, of a judgment-debtor, and also his consequent detention, commenced before the coming into force of Act X of 1877, if such detention is to be regarded as "procedure". The effect of Act I of 1868, s. 6, and Act X of 1877, s. 3, taken in combination, is to remove from the scope of the latter Act all proceedings after decree initiated before its coming into force, and then still pending, and to leave within its range all proceedings after decree initiated after its coming into force, though the suits and decrees, in and under which such last-mentioned proceedings may be taken, were commenced and made before Act X of 1877 came into force. Therefore, assuming the rule as to the retroactive force of enactments relating to procedure laid down in *Wright* v. *Hale* (6 H. & N. 227) to apply, still s. 342 of Act X of 1877 is not retrospective. But the question raised by the present application being one, not merely of procedure, but of the divestment of the existing right of the judgment-creditor, the presumption is, (in the absence of express legislation, or direct implication to the contrary,) against giving retroactive force to s. 342 of Act X of 1877.

The cases relating to questions of mere procedure, whereby a retroactive force has been given to enactments, reviewed, and distinguished from those by which no such force was given, by reason of their raising questions which affected vested rights.

Per SARGENT, J.—Sections 1 and 3 of Act X of 1877, taken in connection with Act I of 1868, s. 6, show that, whilst saving all acts already done in execution of a decree in a suit instituted before Act X of 1877 came into force, all matters of procedure in execution subsequent to that date should be determined by the Act itself. The question raised by the present application is one of procedure, for the conditions and period under and for which the writ of imprisonment remains in force are as much matters relating to procedure as the issuing of the writ. Neither the wording of s. 342 or the heading to ch. xix of Act X of 1877 necessarily confine the "imprisonment," therein referred to, imprisonment commenced since that Act came into force. Though the judgment-creditor, by the arrest and imprisonment of his debtor, acquires a right different from the mere right of a plaintiff to have his cause of action tried according to a certain procedure, yet the rule that an Act is not to be construed retrospectively so as to defeat an existing right, is only a rule of construction, and must yield to the intention of the Legislature. It is difficult to suppose that the Legislature, when introducing a benign change into the law of debtor and creditor, in harmony with modern legislation, could have intended that two laws should continue for the next two years to operate concurrently, and that debtors imprisoned on the day before the latter Act came into force should be liable to be detained under the severer enactment.

Per BAYLEY, J.—Cases on the construction of statutes relating to procedure reviewed. History of imprisonment for debt before recent legislation in England, and before the abolition of the Supreme Court in Bombay. The change effected by Act VIII of 1859 in the relative positions of debtor and creditor pointed out. *Coombe* v. *Carr* (13 Beng. L. R. 268) is inconsistent with the inviolable right claimed by the judgment-creditor to detain the judgment-debtor for two years. The sections of Act VIII of 1859, relating to imprisonment for debt and its duration, are con-

cerned with procedure alone. The definitions of "decree" and "judgment-debtor" in Act X of 1877 are wide enough to include decrees passed, and judgment-debtors who have become such, before the coming into force of the Act. Sections 341 and 342 of Act X of 1877 are applicable to proceedings pending when the Act came into force. The Legislature intended that the improvements introduced by the new Code should apply to suits brought under the old Code in those cases in which, consistently with the provisions of the new Code, they might, upon the ordinary principles of the interpretation of statutes, be clearly applicable. Section 3 of Act X of 1877 implies that the procedure after decree shall be according to the provisions of that Act. *Sumboochundar Haldar* (1 Bourke 69) and *Williams* v. *Smith* (4 H. & N. 559) distinguished. Section 6 of Act I of 1868 does not apply in the present case. When of two possible constructions, one is in strict harmony with the improvements introduced by the Act, and with the spirit of modern legislation, while the other treats the point under consideration as not having been considered by the Legislature at all, the former is to be preferred.

Per GREEN, J.—Apart from s. 1 and the proviso to s. 3, there is not in Act X of 1877 any provision as to its operation with regard to pending or past proceedings. Section 1 does not alter or abridge the legal effect, after 1st October 1877, of proceedings had and completed before that date; and in construing s. 3 regard must be had to Act I of 1868, s. 6, though the general rule of construction contained in the last-mentioned section must yield to the intention of the Legislature expressed in any subsequent Act. The proviso to s. 3, coupled with s. 1 of Act X of 1877, shows that the intention of the Legislature was that the repeal of the old Procedure Act was to affect, to some extent, the procedure, other than that prior to decree, in suits instituted before Act X of 1877 came into force. Ample effect would be given to this intention, while regard would still be had to s. 6 of Act I of 1868, by holding that in all steps and proceedings, not prior to decree, had and taken after the 1st October 1877 in suits instituted before 1st October 1877, the provisions of the new Code are to be operative.

Cases giving a retroactive force to enactments relating only to procedure, reviewed and distinguished.

The right of an execution-creditor to detain his debtor till satisfaction of the decree for a period not exceeding two years, under a warrant issued before 1st October 1877 by virtue of Act VIII of 1859, is in no wise affected by the new Code coming into operation.

Per WEST, J.—Cases on the retroactivity of enactments reviewed. Act VIII of 1859 must have clothed the Court's orders with an abiding validity, and the judgment-creditors with an abiding right, or else with none at all. The ministerial officer is to act on the order of the Court according to its original purport. The order, in the absence of an express provision to the contrary, retains its validity until it is withdrawn or varied. The new procedure, therefore, does not apply, whether as touching person or property, except, perhaps, in matters of mere administration or provisional arrangement. It cannot, at any rate, apply so as to deprive the creditor of his right once acquired by the arrest of his judgment-debtor in execution. Any change in the relations of the parties can be made only in accordance with the later and existing law, but their previously subsisting relations continue to subsist as before. It is unlikely that the Legislature intended

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s. 342 of Act X of 1877 to apply to cases of imprisonment other than those arising under that Act. Section 342 is simply a negative provision, and the affirmative provisions with which it is to be read are to be found in the same chapter of the Act, and these can only be applied to cases arising after the Act has come into force. The close of the litigious transaction, like that of a contractual one, fixes the rights of the parties according to the then existing law, and in principle there is no distinction between a construction prejudicial to the debtor and a construction prejudicial to the creditor. The imprisonment under Act VIII of 1859, as a "proceeding commenced," comes within the scope of s. 6 of Act I of 1868. Act VIII of 1859, therefore, and not Act X of 1877, governs the enforcement of the judgment-creditor's decree throughout the proceedings consequent on his application for the debtor's imprisonment under the former Act. If the present application for discharge be a proceeding commenced since the new Act came into force, it is not integral with the previous proceedings in execution. If, on the other hand, it is integral with them, it is part of a proceeding commenced before the new Act came into force. In neither case can it bring within the new Act orders deriving their validity from another law.

IN THE MATTER OF THE PETITION OF RATANSI KALIANJI ... 148

CIVIL PROCEDURE CODE (ACT X OF 1877), s. 130 453

See INSPECTION.

——ss. 223—229 AND s. 648.]

Small Cause Courts in the Mofussal are not at liberty to execute decrees against moveable property beyond their local jurisdiction.

MUNSUK MOSUNDA'S *v.* SHIVRA'M DEVISING 532

——ss. 223 & 648—*Arrest—Courts of Small Causes.*] Section 223 of the Code of Civil Procedure (Act X of 1877) does not apply to Courts of Small Causes.

Section 648 of the same Act does not apply to a case in which the defendant resides within the same district in which the Court issuing a warrant is situate.

A Court of Small Causes may issue a warrant for the arrest of a person residing in another district, but not if he resides within the same district in which the Court is situate, but outside its local jurisdiction.

CHUNILA'L SOBHA'RA'M *v.* PURBHUDA'S KURSANDA'S 560

——s. 268—*Attachment and Sale of Bonds—Court of Small Causes.*] Under the provisions of s. 268 of the Code of Civil Procedure (Act X of 1877) bonds cannot be sold till the end of six months from the date of attachment.

A Court of Small Causes cannot appoint a receiver. Bonds, therefore, on which recovery will be time-barred before the date on which a sale can legally be made, cannot be made available for satisfaction of the judgment-creditor's debt.

NURSINGDA'S RAGHUNA'THDA'S *v.* TULSIRA'M BIN DOULATRA'M... 558

——ss. 534, 588, 591—*Ex-parte Decree—Right to appeal against Order.*] *Held*, an appeal lies from an order, made under s. 534 of the Civil Procedure Code of 1877, refusing to set aside an *ex-parte* decree.

LUCKMIDA'S VITHALDA'S *v.* EBRA'HIM OOSMAN 644

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CLAIM AGAINST ESTATE OF AN INTESTATE ON ACCOUNT OF MONEYS PAID AFTER HIS DEATH FOR THE SURVIVING MEMBERS OF HIS FAMILY... 75
See SUCCESSION ACT (INDIAN).

COMPANY—*Contributory—Description—Balance Order—List of Contributories—Cause of Action—Evidence—Amendment of Plaint.*] Where the holder of shares in a company was described in the list of contributories, against whom a balance order by the Court of Chancery had been made, as "Devji Bhánji, cotton merchant," and as being sued "in his own right,"

Held that the plaintiffs' company could not be allowed to give evidence that the shares were, in fact, held by a firm consisting of two individuals named, respectively, Bhánji Zutáni and Devji Hemráj; nor could the plaintiffs be allowed, at the hearing of the appeal, to amend their plaint, originally framed against both partners, with a view to making the firm liable for the amount of the calls, so as to sue Bhánji Zutáni only, who alone was alleged to have signed the articles and memorandum of association in the name of Devji Bhánji, and to make him personally liable as the holder of the shares.

Weikersheim's Case (L. R. 8 Ch. Ap. 831) distinguished.

THE LONDON, BOMBAY AND MEDITERRANEAN BANK, LIMITED, *v.* BHA'NJI ZUTA NI 116

CONFESSION—*Evidence.*] Section 25 of the Indian Evidence Act (I of 1872) does not preclude one accused person from proving a confession made to a police officer by another accused person tried jointly with him.

Such a confession is not to be received or treated as evidence against the person making it, but simply as evidence on behalf of the other.

IMPERATRIX *v.* PITA'MBER JINA 61

CONSTRUCTION OF ACTS 148
See CIVIL PROCEDURE CODE.

CONTRACT ACT (IX OF 1872), s. 25, cl. 3—*Recovery of barred Debt—Limitation.*] Act IX of 1871, s. 20, cl. (*a*), does not prevent a plaintiff from maintaining a substantive action on a promissory note passed to secure the amount due on an old note which was barred by limitation at the time of the making of the new, the plaintiff's right to bring such action being recognized by the later enactment, Act IX of 1872, s. 25, cl. 3.

CHATUR JAGSI *v.* TULSI 230

CONTRACT, INCOMPLETE—*Registration—Evidence Act (I of 1872), s. 92, proviso 4—Oral Agreement to rescind a registered Contract.*] D sold a house to P, and executed a deed of conveyance which was duly registered. The purchase-money, however, was never paid by P, who, consequently, never obtained possession. Shortly after the conveyance had been registered, P returned it to D with an endorsement thereon to the effect that it was returned because P was unable to pay the purchase-money. The right, title, and interest of P in the house was subsequently attached and sold under a decree obtained against him by the plaintiff. The plaintiff became the purchaser, and sued D for possession. The lower Courts threw out the claim, on the ground that the property had not passed to P the sale to him being incomplete.

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Held—

(1). The sale of the house by D to P was not incomplete. The deed purported to make an immediate transfer of the ownership of the house to P, and P accordingly became the owner of the house.

(2). The endorsement on the conveyance, not having been registered, could not affect the property.

(3). The conveyance by D to P having been registered, no oral agreement to rescind it could be proved under the Indian Evidence Act (I of 1872), s. 92, proviso 4.

(4). The plaintiff, therefore, as purchaser of the right, title, and interest of P, became legal owner of the house but subject to all P's liabilities; and as D had a lien upon the house for the amount of the unpaid purchase money, the plaintiff could not obtain possession without paying off this charge.

UMEDMAL MOTIRA'M *v.* DAVU BIN DHONDIBA' 547

CONTRIBUTORY 116

See COMPANY.

COSTS OF PROCEEDINGS UNDER ACT XX OF 1864, SUIT TO RECOVER. An action brought to recover costs of proceedings held under Act XX of 1864 is not maintainable when the Court, before which such proceedings were taken, has made no order as to the payment of such costs.

KA BIR VALAD RA'MJAN *v.* MA'HA'DU VALAD SHIWA'JI ... 360

COURT OF SMALL CAUSES 84, 91, 365

See SMALL CAUSE COURT.

COURT-FEES ACT (VII OF 1870), s. 6, cl. IV, arts. (*c*) & (*d*), AND cl. IX, s. 12, cls. 1 & II., sch. III, ACT VII OF 1870, s. 6, cl. IV, arts. (*c*) & (*d*), AND cl. IX.—*Act VIII of* 1859, *ss.* 29, 31, *&* 36—*Suit for setting aside a Mortgage-deed and Injunction against the Mortgagee—Valuation.*] There is no appeal against the order of a District Judge fixing the amount of the court fee chargeable on a plaint.

The right of appeal to which the plaintiff might have been entitled under ss. 31 to 36 of Act VIII of 1859 has been taken away by s. 12, cl. 1 of the Court-Fees Act (VII of 1870).

NA'RA'YAN MA'DHAVRA'V NAIK *v.* THE COLLECTOR OF THA'NA'. 145

—*Declaratory Decree—Consequential Relief—Valuation of Suit—Jurisdiction—Appeal.*] *Held*, following *Nárâyan Mádhavrâo* v. *The Collector of Thánâ* (I. L. R. 2. Bom. 145), that the decision of the Court of first instance, rejecting a plaint for insufficiency of the valuation and stamp for the purposes of the Court-Fees Act (VII of 1870), not being to the detriment of the revenue, is final, and no appeal lies from it.

A suit praying merely for a declaration that the plaintiff is entitled to require the defendants to account to him, and to permit him to inspect their books, is simply a suit for a declaratory decree without consequential relief, and falls within art. 17, cl. iii of sch. II of Act VII of 1870.

A suit praying for such a declaration as the above, and also for a positive order in the nature of a mandatory injunction for the production of the defendants' books and property in their hands, or a suit praying for such declaration as the above, and also for a positive decree for an account to be taken by the Court, and for the production of the books and property, would range under s. 7, cl. iv, art. (*c*) of Act VII of 1870, as being a suit "to obtain a declaratory decree or order where consequential relief is prayed,"

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and also within art. (*d*) of the same section, as being a suit "to obtain an injunction"; and a suit of the third species described above would fall under art. (*f*) of the same clause, as being a suit "for accounts".

Quœre—Whether, in the case of a suit for a declaration of the right of the plaintiff to an account and to inspection of the defendants' books and for a mandatory injunction for the production of those books, or of a suit for such declaration and for a positive decree for the taking of an account by the Court and the production of the defendants' books, the plaint would, by virtue of s. 17 of Act VII of 1870, require separate stamps under arts. (*d*) and (*f*) of cl. iv, s. 7, or be sufficiently covered by the stamp under art. (*c*) of the same clause; and whether, assuming the declaration and the account each to require a stamp, the prayer for an injunction or order for the production of books is not merely ancillary to, and not a distinct subject from, the taking of an account.

Quœre—Whether the provision in s. 7, cl. iv of Act VII of 1870, that the amount of the fee payable in suits falling within that clause shall be computed "according to the amount at which the relief sought is valued in the plaint," is so inconsistent with that portion of s. 31 of Act VIII of 1859, which permits the Court receiving the plaint to revise the valuation of the claim as to render that portion of s. 31 of Act VIII of 1859 inoperative in suits within s. 7, cl. iv of Act VII of 1870, notwithstanding the concluding passage in that clause.

Quœre—Whether the concluding passage in cl. iv, s. 7 of Act VII of 1870 is too express to admit of a limitation of the power of the Judge, and leaves him the right to revise the valuation placed on suits under cl. iv by the plaintiff. But, assuming this to be so, it would, generally, not be advisable that the Judge should enhance the valuation on the reception of the plaint.

The fee payable under s. 7, cl. iv of Act VII of 1870 is according to the amount at which the relief sought is valued in the plaint, and not the value of the subject-matter of the plaint.

Quœre—Whether the First Class Subordinate Judge has jurisdiction to try a suit for an account where the plaint states that the property in the hands of the defendants, in respect of which the account is prayed, exceeds Rs. 5,000, but values the claim at Rs. 100.

MANOHAR GANESH *v.* BA'WA' RA'MCHARANDA'S 219

COVENANTS FOR TITLE IN A VOLUNTARY SETTLEMENT, DAMAGES FOR BREACH OF 273

See SETTLEMENT.

CRIMINAL PROCEDURE ACT (HIGH COURT) (X of 1875), ss. 23 & 101.] The High Court, on a point of law as to the admissibility of rejected evidence, reserved under cl. 25 of the Letters Patent, 1865, and s. 101 of the High Court's Criminal Procedure Act (X of 1875), has power to review the whole case, and determine whether the admission of the rejected evidence would have affected the result of the trial; and a conviction should not be reversed unless the admission of the rejected evidence ought to have varied the result of the trial (Indian Evidence Act, s. 167).

IMPERATRIX *v.* PITAMBAR JINA 61

CRIMINAL PROCEDURE CODE (ACT X OF 1872), ss. 44, 142, 215, 295, 296—*Discharge—Revival of Prosecution.*] When an accused person has been discharged by a Subordinate Magistrate under s. 215 of the Code of the Criminal Procedure, and the Magistrate of the District, after calling for the proceedings, considers that the order

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of discharge was improper, the proper course for the Magistrate of the District to adopt is to refer the proceedings for the orders of the High Court, and not to order a new trial by another Subordinate Magistrate.
IMPERATRIX *v.* GOWDA'PA' 534

CRIMINAL PROCEDURE CODE (ACT X OF 1872), s. 122—*Power of a Magistrate to record a statement of a person not accused of an offence.*] Section 122 of the Code of Criminal Procedure (Act X of 1872) authorizes a Magistrate to record the statement of a person who appears before him as a witness, as well as the confession of a person accused of an offence.
EMPRESS *v.* MA'LKA' 643

——s. 210—*Sanction—Complainant—Withdrawal of Charge—Penal Code, s.* 183.] In cases of contempt of the lawful authority of a public servant, the complainant referred to in s. 210 of the Code of Criminal Procedure, is the public servant whose authority has been resisted, and without whose sanction no criminal proceedings can be instituted against the offender, and not the person injured by the resistance.
In re MUSE ALI ADAM 653

——s. 263, cls. 4 & 5—*Dissent from Verdict of Jurors.*] The "dissent" referred to in the 4th clause of s. 263 of the Criminal Procedure Code (Act X of 1872) must be such a complete dissent as to lead the Judge to consider it necessary for the ends of justice to submit the case to the High Court.
IMPERATRIX *v.* BHAWA'NI 525

——ss. 280 & 297—*Death of Appellant—Abatement of Appeal—Revision.*] The Code of Criminal Procedure gives no right to the heir, devisee, executor, or any other representative of a deceased convict, to lodge an appeal, or continue and prosecute an appeal already lodged.
(KEMBALL *J.*, *diss.*).—The appeal lodged by a convict abates on his death.
The High Court, nevertheless, may call for and examine the record of the case with a view to revision and rectification, and may make such order thereon as it may consider just.
IMPERATRIX *v.* DONGA'JI ANDA'JI 564

——ss. 466 & 468—*Sanction of Prosecution by Government or its Deputy—Mahálkari—Court of District Judge.*] Section 466 of the Code of Criminal Procedure extends to all acts ostensibly done by a public servant, *i. e.*, to acts which would have no special signification except as acts done by a public servant; therefore, a *mahálkari* charged with fabricating the proceedings of a case decided before himself, could not be tried on that charge except with the sanction specified in that section.
Paragraph 1 of s. 466, which mentions a sanction by Government or its deputy, is intended to apply, at least chiefly, to the cases of persons specially responsible to Government, such as accountants who have failed in their duty; and paragraph 2, which speaks of sanction by Government alone, to persons professing to exercise certain authority, and with that pretext doing an act which is impeached by a subject, on the ground of its being wholly unwarranted or of an excess or impropriety of some kind.

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A *mahálkari* falls within the class of public servants contemplated in paragraph 1 of s. 466; a sanction for his prosecution by the District Magistrate is, therefore, sufficient.

For the purpose of sanctioning a criminal prosecution under s. 468 of the Code of Criminal Procedure, the Court of the Subordinate Judge is subordinate to that of the District Judge, notwithstanding that the subject-matter of the litigation in the former Court involves more than Rs. 5,000, and an appeal lies direct to the High Court from the decision of that Court in that matter.

A prosecution commences when a complaint is made, the reception of the complaint being a stage of the judicial proceedings towards conviction.

IMPERATRIX *v.* LAKSHMAN SAKHA'RA'M AND OTHERS ... 481

CRIMINAL PROCEDURE CODE (ACT X OF 1872), s. 468—*Sanction to prosecute—Relative Positions of a Magistrate of the First Class, the Magistrate of the District, and the Court of Session.*] For the purposes of s. 468 of the Code of Criminal Procedure (Act X of 1872) a Magistrate of the First Class is subordinate to the Magistrate of the District: a sanction given by the latter to prosecute a person for intentionally giving false evidence before the former is, therefore, legal and sufficient, notwithstanding the refusal by the former to give such sanction himself.

Semble that the Sessions Court has not power to give such sanction.

IMPERATRIX *v.* PADMANABH PAI 384

CUSTOM—*Illegitimate Son—Heirship.*] A custom recognizing a right of heirship in an illegitimate son by an adulterous intercourse, would be bad.

NA'RA YAN BHA'RTHI *v.* LAVING BHA'RTHI 140

DAMAGES... 133
See EASEMENT.

———FOR BREACH OF COVENANT FOR TITLE ... 273
See SETTLEMENT.

DEATH OF APPELLANT, EFFECT OF 248, 564
See APPEAL.

DECLARATORY DECREE 219
See DECREE.

DECREE—APPLICATION TO KEEP IN FORCE A... ... 294
See EXECUTION OF DECREE.

———DECLARATORY.] A suit praying merely for a declaration that the plaintiff is entitled to require the defendants to account to him, and to permit him to inspect their books, is simply a suit for a declaratory decree without consequential relief, and falls within art. 17, cl. iii. of sch. ii of Act VII of 1870.

A suit praying for such declaration as the above, and also for a positive order in the nature of a mandatory injunction for the production of the defendant's books and property in their hands, or a suit praying for such declaration as the above, and also for a positive decree for an account to be taken by the Court, and for the production of the books and property, would range under s. 7, cl. iv, art. (*c*) of Act VII of 1870, as being a suit "to obtain a declaratory decree or order where consequential relief is prayed," and also within art. (*d*) of the same section, as being a suit "to obtain an injunction;" and a suit of the third species described

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above would fall under art. (*f*) of the same clause as being a suit "for accounts."
MANOHAR GANESH *v.* BA'WA' RA'MCHARANDA'S 219

DECREE, DECLARATORY 120
See LIMITATION.

——EXECUTION OF—
See EXECUTION OF DECREE.

——*EX-PARTE* 644
See Ex-parte DECREE.

——*Execution Sale—Setting aside Sale—Sheriff—Warranty—Title—Recovery of Purchase-money.*] A purchaser of property, whether immoveable or moveable, at a sale in execution of a decree under the Code of Civil Procedure, 1859, held in accordance with the provisions of that Code, has no right to recover his purchase-money, though it may turn out that the right, title, and interest of the execution-debtor was nothing at all, unless the sale itself be set aside, and the sale will not be set aside by reason merely of the defect or absence of title in the thing sold on the part of the execution-debtor; but, if there is an express assertion that the goods sold are the property of the execution-debtor, the sheriff and the execution-creditor are bound by such warranty, to the extent, at least, that that one of them, in whose hands the purchase-money is, is bound to restore it to the purchaser, if the purchaser has not got that for which he paid.

Section 258 of Act VIII of 1859 applies wherever a sale is set aside, whether for irregularity in publishing or conducting a sale, or for other grounds; and, though the right of the purchaser to recover back his purchase-money, in case of the sale being set aside, is, by that Act, given expressly only where the sale is of immoveable property, yet the same consequence would follow where a sale of moveable property in execution has been set aside.

Where, therefore, certain shares were attached by the execution-creditor as the property of the execution-debtor, and were afterwards sold in execution by the sheriff, and the execution orders and warrants and the sheriff's proclamation of sale contained assertions of interest of the execution-debtor in these shares, whereas he had no such interest,

Held that the purchaser at the execution sale was entitled to have the sale set aside, and his purchase-money returned to him; but the sheriff's liability to the purchaser in such a case ceases so soon as he has paid over the proceeds of the sale to the execution-creditor, and the purchaser's remedy thereafter is against the execution-creditor only.

Bank of Hindustan v. *Premchand Raichand* (5 Bom. H. C. Rep. 83, O. C. J.) commented upon.
FRA'MJI BESANJI DASTUR *v.* HORMASJI PESTANJI ... 258

——PAYABLE BY INSTALMENTS 356
See INSTALMENTS.

——SALE UNDER—*Decree reversed in appeal before sale confirmed.*] Plaintiff's title to certain land in dispute was derived from the purchaser at a Court's sale, under a decree which was reversed in appeal subsequently to the sale, before it had been confirmed.

Held that the Court, which had made the decree, ceased, from the moment of the reversal, to have jurisdiction to take any further steps to execute the decree. Though the Court, when it confirmed

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the sale, was probably not informed that its decree had been reversed, and the purchaser was probably ignorant of it, yet the act of the Court in completing the sale was none the less without jurisdiction: and, being without jurisdiction, could confer no title.

If a decree be reversed after a sale under it has become absolute, and a certificate has been granted to the purchaser, the title of the purchaser is not affected by the reversal of the decree.

A purchaser is bound to satisfy himself as to the jurisdiction of a Court to order a sale, and this obligation continues until the sale is completed. Before he applies to the Court to confirm the sale and grant him a certificate, the purchaser ought to ascertain that the decree, under which the sale was ordered, is still in existence.

BASA'PPA' *v.* DUNDA'YA' 540

DECREE, SALE UNDER—*Right to Emblements.*] On the 14th of July 1876, B obtained a decree against D, directing D to pay the amount advanced upon a mortgage of D's lands within six months from the date of decree, or, in default of payment, the lands to be sold, with liberty to B to bid at the sale. Default having been made, the lands were sold on the 21st of June 1877, and B became the purchaser. At the time of the sale the lands were in the occupation of D's tenants under an agreement to give to D a moiety of the crops. On the 11th December 1877, P, another judgment-creditor of D, attached the crops on those lands which had been cut and stored by D's tenants since the date of the sale.

Held that, by the sale to B, all right, title, and interest of D, including his right to the moiety of the crops in the hands of his tenants, passed to B, and no residual right remained in D on which P's execution could operate, the crops not having been actually carried away and appropriated by D.

LAND MORTGAGE BANK OF INDIA *v.* VISHNU GOVIND PA'TANKAR 670

——————SETTING ASIDE 449
See PRACTICE.

DEED IN ENGLISH FORM 1
See MORTGAGE.

DELAY 133
See ANCIENT LIGHTS.

DESHMUKH.] A plaintiff alleging that, as the hereditary *deshmukh* of certain *máhals*, he was entitled to be paid directly by the ryots of these *máhals* a percentage on the revenue thereon assessed, sued to recover a portion of such percentage which had been collected along with the revenue and retained by the Government: *Held* that the claim was "a suit relating to a grant of money or land-revenue" and, as such, excluded from the jurisdiction of the Civil Courts by s. 4 of "The Pensions Act (XXIII of 1871)."

VA'SUDEV SADA'SHIV MODAK *v.* THE COLLECTOR OF RATNA'GIRI 99

DIGNITY, SUIT TO VINDICATE RIGHT TO A.] Plaintiff sued for a declaration of his right to take a cupola to a certain temple, and to place it upon the car of the idol, and to take a *nandicola* (bamboo) with tom-toms from his house to the temple, and to offer the first cocoanut to the idol at the annual festival held in honour of a certain Lingáyet saint.

Held that the suit was not maintainable, as it was brought to vindicate plaintiff's right, not to an office, but to a mere dignity unconnected with any fees, profits, or emoluments.

SANGA'PA' BIN BASLINGA'PA' *v.* GANGA'PA' BIN NIRANJA'PA' ... 476

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DISSENT OF COURT FROM VERDICT OF JURORS.] The "dissent" referred to in the 4th clause of s. 263 of the Criminal Procedure Code (Act X of 1872) must be such a complete dissent as to lead the Judge to consider it necessary for the ends of justice to submit the case to the High Court.
IMPERATRIX *v.* BHAWA'NI 525

DISTRIBUTION, STATUTE OF (22 & 23 CAR. II, c. 10) 75
See PA'RSI SUCCESSION ACT.

DISTURBANCE OF OFFICE 470
See OFFICE OF CHALVADI.

EASEMENT 133
See ANCIENT LIGHTS.

———*Light and Air.*—The plaintiff and defendant being owners of two adjoining houses, with a common party wall between them, the former placed a window-frame in an aperture in an upward extension of his part of the wall which he had erected eight years before suit, and the latter thereupon raised the wall on her side so as to cut off the supply of light and air which the plaintiff used to receive before, and after placing of the window-frame.
Held that there had been no appropriation of the light and air by the plaintiff for the statutory period (twenty years) creating in him a right of easement, and entitling him to relief against the inconvenience sustained by him.
SARUBAI *v.* BA'PU NA'RHA'R 660

ESTOPPEL 273
See REGISTRATION ACT.

EVIDENCE—*Confession—Indian Evidence Act (I of 1872), ss. 25 & 167—High Court's Criminal Procedure Act (X of 1875), ss. 23 & 101—Letters Patent, 1865, cl. 25—Power of the High Court on a point of Law reserved to consider the merits of the case.*] Section 25 of the Indian Evidence Act (I of 1872) does not preclude one accused person from proving a confession made to a police officer by another accused person tried jointly with him.
Such a confession is not to be received or treated as evidence against the person making it, but simply as evidence on behalf of the other.
The High Court, on a point of law as to the admissibility of rejected evidence, reserved under cl. 25 of the Letters Patent, 1865, and s. 101 of the High Court's Criminal Procedure Act (X of 1875), has power to review the whole case and determine whether the admission of the rejected evidence would have affected the result of the trial; and a conviction should not be reversed unless the admission of the rejected evidence ought to have varied the result of the trial (Indian Evidence Act, s. 167).
IMPERATRIX *v.* PITA'MBER JINA 61

———*Unregistered Document, when admissible* 273
See REGISTRATION ACT.

———*Company—List of Contributories—Evidence as to person indicated as holder.*] Where the holder of shares in a company was described in the list of contributories, against whom a balance order by the Court of Chancery had been made, as "Devji Bhánji, cotton merchant," and as being sued "in his own right,"

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Held that the plaintiff's company could not be allowed to give evidence that the shares were, in fact, held by a firm consisting of two individuals named, respectively, Bhánji Zutáni and Devji Hemráj; nor could the plaintiffs be allowed, at the hearing of the appeal, to amend their plaint, originally framed against both partners, with a view to making the firm liable for the amount of the calls, so as to sue Bhánji Zutáni only, who alone was alleged to have signed the articles and memorandum of association in the name of Devji Bhánji; and to make him personally liable as the holder of the shares.

Weikersheim's Case (L. R. 8 Ch. Ap. 831) distinguished.

THE LONDON, BOMBAY AND MEDITERRANEAN BANK, LIMITED, *v.* BHA'NJI ZUTA'NI 116

EVIDENCE ACT (I OF 1872), s. 91—*Registration—Practice.*] A deed of partition was executed among three brothers, C, N, and B, on the 19th March 1867, but was not registered. It recited that, some years previously to its date, a division of the family property, with the exception of three houses, had been effected, and it purported to divide those houses among the brothers. In a suit brought by C's widow for the recovery of the house which fell to C's share,

Held that, although the deed did not exclude secondary evidence of the partition of the family property previously divided, yet it affected to dispose of the three houses by way of partition made on the day of its execution, and, therefore, secondary evidence of its contents was inadmissible under s. 91 of the Indian Evidence Act.

A Judge is not permitted to make, in appeal, a different case for the appellant from that which he alleged for himself in the Court of first instance.

KA'CHUBHA'I *v.* KRISHNA'BA'I 635

EXECUTION OF DECREE—*Sale under a Decree reversed in appeal before confirmation.*] Plaintiff's title to certain land in dispute was derived from the purchaser at a Court's sale, under a decree which was reversed in appeal subsequently to the sale, but before it had been confirmed.

Held that the Court which had made the decree ceased, from the moment of the reversal, to have jurisdiction to take any further steps to execute the decree. Though the Court, when it confirmed the sale, was probably not informed that its decree had been reversed, and the purchaser was probably ignorant of it, yet the act of the Court in completing the sale was none the less without jurisdiction; and being without jurisdiction, could confer no title.

If a decree be reversed after a sale under it has become absolute, and a certificate has been granted to the purchaser, the title of the purchase is not affected by the reversal of the decree.

A purchaser is bound to satisfy himself as to the jurisdiction of a Court to order a sale, and this obligation continues until the sale is completed. Before he applies to the Court to confirm the sale and grant him a certificate, the purchaser ought to ascertain that the decree, under which the sale was ordered, is still in existence.

BASA'PPA' BIN MALA'PPA' *v.* DUNDA'YA' BIN SHIVLINGA'YA' ... 540

———*Imprisonment for Debt—Discharge from Arrest* 148
See CIVIL PROCEDURE CODE.

———*Re-sale—Rights of Judgment-creditor.*] Where property has been sold under a decree, and the purchaser at the execution-sale has made default in paying the purchase-money, the remedy of

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the judgment-creditor is not limited by s. 254 of Act VIII of 1859 to a suit against the defaulting purchaser. He is entitled to recover the balance of his debt from his judgment-debtor, who may, perhaps, have his remedy against the defaulting purchaser.

Joobráj Singh v. *Gour Buksh Lál* dissented from.

ANANDRA'V BA'PUJI *v.* SHEKH BA'BA' 562

EXECUTION OF DECREE—*Limitation Act (IX of* 1871) *sch. II, art. 167, cl. 4—Application to keep in force Decree or Order.*] The "application" spoken of in art. 167, cl. 4, of sch. II to Act IX of 1871 is merely not such an application as is contemplated by s. 212 of Act VIII of 1859, but includes an application to keep in force a decree or order.

The language of art. 167, cl. 4, of sch. II to Act IX of 1871 is wide enough to include any application to enforce or keep in force decrees or orders, and, consequently, an application to enforce or keep in force a decree by the attachment of a portion of the property of the defendant, will keep the decree alive against the residue of his property or his person.

An order for attachment of a pension in satisfaction of a decree, obtained on the 10th December 1863, was made on 16th April 1869. After the passing of the Pensions Act (XXIII of 1871), the Deputy Collector refused to continue paying the pension to the decree-holder, and returned to the Court the warrant of execution issued under the order of 16th April 1869; and an order, finally disposing of the application for attachment, was made on 14th June 1872. On 19th June 1872 the decree-holder presented a fresh application, praying that the attachment of the pension might be continued, and a letter be written to the Collector, directing him to continue to pay the pension to the decree-holder, as directed by the order of 16th April 1869.

Held that such last-mentioned application came within cl. 4 of art. 167 of sch. II to Act IX of 1871, and that, consequently, an application, on 24th July 1874, for execution of the decree of 10th December 1863 was not barred.

Held, also, that the decree might properly be enforced against property of the defendant, mentioned in the application of 1874, other than the property mentioned in the applications of 1869 and 1872.

JAMNA DA'S *v.* LALITARA'M 294

———*Sale—Recovery of Purchase-money by Purchaser where Sale set aside—Warranty—Title.*] A purchaser of property, whether immoveable or moveable, at a sale in execution of a decree under the Code of Civil Procedure, 1859, held in accordance with the provisions of that Code, has no right to recover his purchase-money, though it may turn out that the right, title, and interest of the execution-debtor was nothing at all unless the sale itself be set aside, and the sale will not be set aside by reason merely of the defect or absence of title in the thing sold on the part of the execution-debtor; but, if there is an express assertion that the goods sold are the property of the execution-debtor, the sheriff and the execution-creditor are bound by such warranty, to the extent, at least, that that one of them in whose hands the purchase-money is, is bound to restore it to the purchaser, if the purchaser has not got that for which he paid.

Section 258 of Act VIII of 1859 applies wherever a sale is set aside, whether for irregularity in publishing or conducting a sale or for other grounds; and though the right of the purchaser to recover back his purchase-money in case of the sale being set aside is

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by that Act given expressly only where the sale is of immoveable property, yet the same consequence would follow where a sale of moveable property in execution has been set aside.

Where, therefore, certain shares were attached by the execution-creditor as the property of the execution-debtor, and were afterwards sold in execution by the sheriff, and the execution orders and warrants and the sheriff's proclamation of sale contained assertions of interest of the execution-debtor in these shares, whereas he had no such interest,

Held that the purchaser at the execution sale was entitled to have the sale set aside and his purchase-money returned to him; but the sheriff's liability to the purchaser in such a case ceases so soon as he has paid over the proceeds of the sale to the execution-creditor, and the purchaser's remedy thereafter is against the execution-creditor only.

FRA'MJI BESANJI DASTUR *v.* HORMASJI PESTANJI FRA'MJI ... 258

EXECUTION OF DECREE—*Attachment and Sale of Bonds* 558

See BONDS.

———*Act VIII of* 1859, *s.* 269—*Attachment and Sale of the Interest of Co-parcener in undivided Estate—Partition—Possession.*] When the defendant is in possession by virtue of an order under s. 269 of Act VIII of 1859, the plaintiff can only succeed on the strength of his own title.

K and R, two out of five undivided Hindu brothers, sued V (a purchaser at an execution sale of the interest of one of the brothers other than K and R) for the recovery of certain land of which V had obtained possession under s. 269 of Act VIII of 1859. The lower Court awarded two-fifths of the land to K and R as being the amount of their share in the land.

Held by the High Court that the decree could not be maintained, as K and R, being two of several co-parceners in undivided property, could not say that they were entitled to a specific share in any portion of that property. They might have sued for a general partition, or for a decree declaring them entitled to joint possession with V.

A purchaser at a Court sale ought not to be put in exclusive possession of the whole undivided land by virtue of a decree against one co-parcener only.

KALLAPA *v.* VENKATESH VINAYAK... 676

EXECUTOR, RIGHTS OF HINDU.] The rule of English common law, that the undisposed of residue of personal estate vests in the executor beneficially, does not apply to the will of a Hindu testator in India.

An executor, who by the will is made an express trustee for certain purposes, is, as to the undisposed of residue, a trustee, within the scope of s. 2 of Act XIV of 1859, for the heir or heirs of the testator.

LALLUBHA'I BA'PUBHA'I *v.* MANKUVARBA'I... 388

EX-PARTE DECREE, SETTING ASIDE 449

See PRACTICE.

———RIGHT OF APPEAL AGAINST AN ORDER REFUSING TO SET ASIDE AN—*Code of Civil Procedure* (*Act X of* 1877, *c.* xxxix) *and ss.* 588—591—*Summary Procedure on negotiable Instruments.*] *Held*—An appeal lies from an order made under s. 534 of the Civil Procedure Code of 1877, refusing to set aside an *ex-parte* decree.

LUCKMIDA'S VITHALDA'S *v.* EBRA'HIM OOSMAN 644

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FAMILY NECESSITY 666
See HINDU LAW.

FISHING IN THE SEA, RIGHT OF—*Jurisdiction—Res Judicata—Cause of Action.*] The District Court may, when the defendants reside within its local jurisdiction, try a suit for damages for and restrain by injunction an alleged illegal disturbance of the right of the plaintiff as a member of the public to fish and use fishing stakes and nets fixed in the sea below low-watermark and within three miles of it.

The dismissal, on the ground of want of jurisdiction, by the Civil Court of a suit to eject the defendants from the fishing ground of the plaintiffs, situate below low-water-mark, does not operate as a bar to a subsequent suit by the plaintiffs to recover damages from the defendants for fixing their fishing stakes and nets too near to those of the plaintiffs.

Rights of the Crown and of the public in the waters and the sub-jacent soil of the sea discussed.

The right of the public to fish in the sea, whether it and its sub-jacent soil be or be not vested in the Crown, is common, and is not the subject of property

That right may, in certain portions of the sea, be regulated by local custom.

Members of the public, exercising the common right to fish in the sea, are bound to exercise that right in a fair and reasonable manner, and not so as to impede others from doing the same; and conduct which prevents another from a fair exercise of his equal right, if special injury thereby results to him, is actionable.

BA'BAN MAYA CHA' *v.* NA'GU SHRA'VUCHA 19

GA'HA'N LA'HA'N MORTGAGE 231
See MORTGAGE.

GOSA'VIS, SUCCESSION AMONG.] The illegitimate son of a married woman by a *Gosávi*, with whom she is living in adultery while undivorced from her lawful husband, cannot inherit his father's property.

NA'RA'YAN BHA'RTHI *v.* LAVING BHA'RTHI 140

GRATUITIES RECEIVED BY AN INTRUDER INTO AN OFFICE, ACTION TO RECOVER 470
See OFFICE OF CHALVADI.

GRAZING—*Right to free Pasturage.*] Plaintiff erected a hut on public ground in a village in the district of Thána, and lived there annually for a few months, while his cattle grazed on the public grazing ground in that village. He was not the owner or lessee of any land in the village. On being prevented by the Collector of Thána from thus grazing his cattle, plaintiff brought a suit against that officer for a declaration of his right to graze his cattle within the limits, not only of that village but of any other village in the district of Thána.

Held that plaintiff was not entitled to any such right.

The phrase "village cattle" in s. 32 of Bombay Act of 1865 does not include the cattle of any roving grazier who may choose to squat for a few months on the public ground of a village. That Act does not vest the right of sanctioning such a diversion of the village grazing ground in the villagers themselves, but in the Revenue Commissioner, whose consent must be obtained.

THE COLLECTOR OF THA'NA' *v.* BA'L PA'TEL 110

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HEREDITARY OFFICES (BOMBAY) ACT (III OF 1874)—*Jurisdiction—Suit for Declaration of Right to officiate as sole Representative of a Branch of a Vatandár Family.*] From the date of the coming into force of the Bombay Hereditary Offices Act (III of 1874), it is not competent to the Civil Court to entertain a suit for a declaration of right to officiate as the sole representative of a branch of a *vatandár* family, the Act constituting the Collector a judge for this and other purposes of the Act.

KHANDO NA'RA'YAN KULKARNI *v.* AP'AJI SADA'SHIV KULKARNI. 370

———*Representative Vatandá'rs—Jurisdiction of Civil Courts.*] Since Bombay Act III of 1874 came into force, no suit will lie in a Civil Court for a declaration that a person is eligible to officiate as a hereditary officer falling within the scope of that Act.

Since that Act became law, none but representative *vatandárs* or their deputies or substitutes can officiate; and the duty of determining what persons shall be recognized as representative *vatandárs*, is vested in the Collector, whose proceeding is a judicial proceeding.

CHINTO ABA'JI KULKARNI *v.* LAKSHMIBA'I 479

HIGH COURT, POWER OF THE, TO CONSIDER MERITS OF THE CASE ON A POINT OF LAW RESERVED 61

See CRIMINAL PROCEDURE ACT (HIGH COURT).

HINDU LAW—*Ancestral Property—Undivided Family—Liability of an undivided Hindu for the Debts of his deceased Brother.*] P, an undivided Hindu co-parcener, died on the 7th August 1874, leaving him surviving a brother C, and a son N. N subsequently died on the 2nd July 1875. In a suit brought by plaintiff against C, on a bond executed by P as surety for one R,

Held that the family property, which on N's death became vested by survivorship in C, was not in his hands liable for the separate debts of P or N.

NARSINBHAT BIN BA'PUBHAT *v.* CHENA'PA' BIN NINGA'PA' ... 375

———*Maintenance—Widow—Charge on Estate in the hands of Purchaser with Notice—Notice.*] In a suit for maintenance brought by a Hindu widow against her husband's brother, who was the sole surviving member of that husband's family, and against *bond-fide* purchasers for value from him (the defendant) of certain immoveable ancestral property of the family,

Held—

The mere circumstance that such purchasers had notice of her claim, is not conclusive of the widow's rights against the property in their hands.

If the property were sold in order to pay debts (not incurred for immoral purposes) of her husband, or his father, or grandfather, or for the benefit of the undivided family, or to satisfy a former decree obtained by the plaintiff herself against the same defendant for maintenance, such sale would be valid against her, whether or not the purchasers had notice of her claim.

Per WEST, J.—According to the Mitákshara, sons must, from the moment of their father's death, be regarded as sole owners of the estate, yet with a liability to provide for the maintenance of their father's widow, and with a competence on the widow's part to have the estate made answerable. If the sons make a division of the estate, they must allot to their mother an equal share, and

the same to any sonless widow of their father. The widow has no proprietorship in the estate before its partition, but she has an equity to a provision, which the Court will enforce to guard her against attempted fraud.

The debts of the deceased owner take precedence of the maintenance of the widow. The estate is properly applied, in the first instance, by the sons as managers in payment of such debts.

By a sale of the property the sons cannot evade a personal liability to provide for the widow.

If a mother, foregoing her claim to a separate provision out of the paternal property, resides with her sons or step-sons, and is maintained by them, she must submit to their dealing with the estate. A fraudulent alienation for the purpose of defeating her claims, will not be supported, but the particular assignee for value acquires a complete title.

In the case of a widow of an ordinary co-parcener as against the surviving members of the joint family, *her* claim being strictly to maintenance only, regulated by the circumstances of the joint family, it appears that, although she may have her maintenance made a charge on the property, yet, if she should refrain from that course, she leaves to the co-parceners an unlimited estate to deal with at their discretion and in good faith.

If there is an ample estate left, out of which to provide for the widow, or, if knowing of a proposed sale, she does not take any step to secure her own interest, no imputation of bad faith, or of abetting it, can be made against the purchaser of a portion of the joint property. If the widow, on the other hand, is not accepting support from the co-parcener, if she lives apart, and if the estate is small and insufficient, it is the vendee's duty, before purchasing, to inquire into the reason for the sale, and not by a clandestine transaction to prevent the widow from asserting her right against the intending vendor. It is in this connection that the doctrine of notice becomes of importance.

The knowledge of collateral rights created by agreement, in equity frequently qualifies those acquired by a purchaser. The widow's right to maintenance is a right maintainable against the holders of the ancestral estate in virtue of their holding no less through the operation of the law than if it had been created by agreement, and so when the sale prevents its being otherwise satisfied it accompanies the property as a burden annexed to it in the hands of a vendee with notice that it subsists, though equity as between the vendee and the vendor will make the property retained by the latter primarily answerable.

Whether such a claim by a widow against the estate of her deceased husband in the hands of a purchaser, is enforceable or, not, does not depend upon whether the remainder of the estate in the hands of the heir has been exhausted. What was honestly purchased is free from her claim for ever. What was purchased in furtherance of a fraud upon her, or with knowledge of a right which would thus be prejudiced, is liable to her claim from the first. The relations of the parties are determined once for all at the moment of the sale.

There is no authority for the doctrine which makes the claim of widows not entitled to a share of property in case of partition, a real charge on the inheritance, and ranks the claim of widows who are so entitled as a mere moral obligation. In all cases it is a claim to maintenance merely, not interfering (so long as it has

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not been reduced to certainty by a legal transaction) with the right of the actually participant members to deal with the property at their discretion, provided this dealing is honest and for the common benefit.

The reduction of the number of surviving co-parceners to a single person makes no difference in the widow's legal position. The rights and obligations of the original co-parceners fall at last to the sole survivor. The widows must be maintained by him out of the property, but he may still deal with the estate at his discretion in the absence of actual fraud or of a decree which has converted some widow's claim into an actual right *in re*. The purchaser from him takes a perfectly good title, and one which, if good at the time, cannot be impaired by subsequent changes in the circumstances of the vendor's family.

Authorities on the subject of Hindu widow's maintenance reviewed.

LAKSHMAN RA'MCHANDRA *v.* SATYA'BHA'MA'BA'I 494

HINDU LAW—*Maintenance—Nephew's Widow—Widow voluntarily living apart from husband's relatives.*] In the Island or Presidency of Bombay, a Hindu widow, voluntarily living apart from her husband's relatives, is not entitled to a money allowance as maintenance from them if they were separated in estate from him at the time of his death, nor is she entitled to such maintenance from them whether they were separated or unseparated from him at the time of his death, if they have not any ancestral estate or estate belonging to him in their hands.

The doctrine, that in certain relationships and independently of the possession of ancestral estate, maintenance is a legal and imperative duty, while in other relationships it is only a moral and optional duty, discussed.

Semble—A Hindu widow, who has received a full share as and for her maintenance, cannot, when she has exhausted it, enforce from the relatives of her husband, or from the family estate, a further allotment, or a money allowance for maintenance.

Semble—The *stridhan* of a Hindu widow should be taken into account in determining whether and to what extent she should have maintenance assigned to her.

S, a Hindu widow, voluntarily living apart from her husband's family, sued his paternal uncle, the nearest surviving male relative of her husband, for a money allowance as maintenance. *Held*, that such suit was unsustainable for either of the two following reasons, viz.: 1, That the defendant was separated in estate from the plaintiff's husband at the time of his death. 2, That at the institution of the suit the defendant had not in his hands any ancestral estate, or any estate which had belonged to the plaintiff's husband.

Decisions of the Bombay Sadr Adálat on the right to maintenance reviewed.

Bái Lakshmi v. *Lakhmidás Gopáldás* (1 Bom. H. C. Rep. 13), *Chandrábhágábái* v. *Kashináth* (2 Bom. H. C. Rep. 323), and *Timmáppá* v. *Parmeshriámmá* (5 Bom. H. C. Rep. 130, A.C.J.) disapproved.

Udarám Sitárám v. *Sonkábái* (10 Bom. H. C. Rep. 483) considered.

Rujjomoney Dossee v. *Shibchander Mullick* (2 Hyde. 103), *Khetramani Dasi* v. *Káshináth Dás* (2 Beng. L. R. 15, A. J.),

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and *Gangábái* v. *Sítárám* (Ind. L. R. 1 All. 170) approved and followed.
SAVITRIBA'I *v.* LUXIMIBA'I AND SADA'SHIV GUNOBA' 573

HINDU LAW—*Maintenance, Right of adult son to.*] If a Hindu father possesses practically no partible property, his legitimate son, though adult, suffering from no disability to inherit, is entitled to maintenance from him.
RA'MCHANDRA SAKHA'RA'M *v.* SAKHA'RA'M GOPA'L 346

———*Maintenance, amount of, granted to a Hindu Widow.* A Hindu widow is not entitled to a larger portion of the annual produce of the family property as maintenance than the annual proceeds of the share to which her husband would have been entitled on partition, if he were living.
MADHAVRA'V KESHA'V TILAK *v.* GANGA'BA'I 639

———*Separate Maintenance, a Wife's Right to.*] Although by Hindu law a husband is bound to maintain his wife, she is not entitled to a separate maintenance from him unless she proves that, by reason of his misconduct or by his refusal to maintain her in his own place of residence or other justifying cause, she is compelled to live apart from him.
SIDLINGA'PA' *v.* SIDA'VA' 634

———*Marriage—Nágar Vissa Vánió Caste—Palu—Inheritance—Administration—Costs.*] The Hindu law, at least as evidenced by usage, though it permits the Asura form of marriage among the mercantile and servile classes, does not prohibit to those classes the more approved forms of marriage.

The form of marriage in use among the Nágar Vissá section of the Vánia caste corresponds to one or other of the approved forms, and not to the Asura, and the giving of *palu* does not constitute a purchasing of the bride.

Property inherited from her deceased husband by a childless widow among the Nágar Vissá Vanias, at her death, intestate, devolves on the relations in blood, on the mother's side, of the husband in preference to the heirs and next of kin of the widow.

An applicant for letters of administration to the estate of a widow, having concealed the existence and claims, of which he was aware, of the relatives of the deceased husband of the widow, on the application being dismissed, was ordered to pay the costs of the application and of the caveats entered by some of the relatives of the deceased husband.
JAIKISONDA'S GOPA'LDA'S *v.* HARKISONDA'S 9

———*Talabda Koli Caste—Adoption—Contract to settle—Specific Performance—Alienation of Immoveable Property by Hindu Widow—Limitation.*] It is not a necessary consequence of the circumstance that the spiritual motive for adoption, which exists amongst the higher castes of Hindus, has no influence upon the *Talabda Koli* caste, that its members may not lawfully adopt.

Where a member of the *Talabda Koli* caste of Hindus, by an express promise to settle his property upon the boy, induced the parents of the defendant to give him their son in adoption, but died without having executed such settlement,

Held, that the equity to compel the heir and legal representative of the adoptive father specifically to perform his contract, survived; and the property in the hands of his widow was bound by that contract.

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Therefore, when the widow of the adoptive father, nearly thirty years after his death, gave effect to his undertaking by executing a deed of gift of his property in her hands in favour of the adopted son,

Held that such alienation was valid as against the next heir by blood of the adoptive father, and he could not, on the death of the widow, avail himself of the plea of limitation which she had waived.

The nature of a Hindu widow's estate in immoveable property considered.

BHA'LA NA'HANA' *v.* PARBHU HARI 67

HINDU LAW—*Illegitimacy—Succession—Gosávis—Custom—Maintenance.*] The illegitimate son of a married woman by a *Gosavi* with whom she is living in adultery while undivorced from her lawful husband cannot inherit his father's property.

A custom recognizing a right of heirship in an illegitimate son by an adulterous intercourse, would be bad.

The right of an illegitimate son to maintenance out of his deceased father's property, cannot be decided in a suit which concerns a portion only of that property, and to which all persons in possession of the rest of the father's property are not parties.

NA'RA'YAN BHA'RTHI *v.* LAVING BHA'RTHI 140

———*Inheritance* 9

See INHERITANCE.

———*Sale—Possession—Notice—Registration.*] Delivery of possession of property sold is, under the Hindu law, essential to complete the title of the vendee against a third party purchasing with possession from the same vendor without notice of the prior transaction.

The rule prevails as between competing conveyances both of which have been registered.

Authorities and Hindu-law texts on the subject reviewed.

LALUBHA'I SURCHAND *v.* BA'I AMRIT... 299

———*Adoption, Competency of a Wife to give in—Adoption—Conditional Adoption—Non-fulfilment of a Condition—Mistake of Fact.*] According to the Hindu law prevailing in the Bombay Presidency a wife is not competent to give her son in adoption against the will, express or implied, of her husband, the father of that son, or under circumstances from which the husband's dissent can be inferred.

Where the natural father of the son given in adoption wrote to the adoptive mother, a widow, giving his consent to the adoption on certain conditions,

Held that a non-fulfilment of one of the conditions rendered the adoption invalid, notwithstanding that the condition was unnecessary, and imposed in consequence of a mistake as to the necessity for the assent of Government to the adoption.

RANGUBA'I *v.* BHAGIRTHIBA'I 377

———*Mortgage—Sale—Estoppel.*] The three senior members of an undivided Hindu family—the remaining member of which had disappeared—setting forth a ground of necessity, executed to the plaintiff, in November 1870, a mortgage, duly registered, of a piece of land which formed part of the family estate.

Certain judgment-creditors of the absent member subsequently attached and sold his share in the said land under their decree. The plaintiff's undivided son purchased it, and in 1872 resold his right, title, and interest in it to the defendant's father, without disclosing the fact of his father's mortgage, but without any active

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fraud on the part of himself or his father to suppress the fact from the knowledge of his purchaser.

In 1874 the plaintiff obtained a decree upon his mortgage, and attached the land.

In a suit by the plaintiff to establish his right as against all the land included in his mortgage,

Held that the mortgage being, under the circumstances, a valid one, the sale of the absent son's share was subject to the lien created thereby, which lien was not disturbed by the purchase and subsequent sale of the share by the son of the mortgagee. The origin of the son's title was stated in the deed of sale to the new purchaser, who, by the fact of its being a sale of a *share*, was put upon inquiry.

The mere want of disclosure, by the plaintiff's undivided son, of his father's mortgage was not enough to create an estoppel against his father seeking to establish his claim under the mortgage.

R. S. JOSHI *v.* L. B. JOSHI... 650

HINDU LAW—*Family Necessity—Manager's Discretion—Sale by Father of Ancestral Estate.*] The expression "family necessity," justifying the sale of ancestral property, must be construed reasonably, and the head of the family and those dealing with him must be supported in transactions which, though in themselves diminishing the estate, yet prevent or tend to prevent still greater losses. A reasonable latitude must be allowed for the exercise of a manager's judgment, especially in the case of a father, though this must not be extended so far as to free the persons dealing with him from the need of all precautions where a minor son has an interest in the property.

The fact that a mortgage or a bond, to pay off which ancestral property is sold, had some time to run, is not a sufficient reason to disprove an otherwise apparent family necessity.

The Hindu law recognizes a debt contracted by the father of a family to enable him to earn a maintenance as one contracted under pressure of a family necessity.

BA'BA'JI MAHA'DA'JI *v.* KRISHNA'JI DEVJI 666

HINDU LAW BOOKS.] The Institutes of Manu, the Mitákshará, and the Mayukha, although of great authority in the Presidency of Bombay, are all subject to the control of law and usage. No one of them is, as a whole, in full force in any part of the Presidency. In all of them there are precepts which, if they ever were practical law, have, for a time beyond the memory of living men, been obsolete.

LALLUBHA'I BA'PUBHA'I *v.* MA'NKUVABBA'I 388

HUSBAND AND WIFE—*Separate Property.*] The rule laid down in *Graham* v. *Londonderry* (3 Atk. 393) with regard to a husband's rights over ornaments given to his wife by her father, applied to Pársis.

DHANJIBHAI BOMANJI GUGRA'T *v.* NAVAZBA'I 75

ILLEGITIMATE SONS—*Succession—Maintenance* 146
See HINDU LAW.

INA'M CHITHI 362
See VAKIL AND CLIENT.

INA'M VILLAGE—*Act XI of* 1852.] In an enquiry under Act XI of 1852 the *Inám* Commissioner, on the 30th January 1865, decided that a certain *inám* village should be continued to the male descendants of the original grantee—*Held* that the decision of the

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Inám Commissioner was only intended to regulate the duration of the exemption of the *inám* village from assessment, and not to regulate the enjoyment of it as between the heirs of the original grantee.

VASUDEV ANANT *v.* RA'MKRISHNA AND SHIVRA'M NA'RA'YAN ... 529

INHERITANCE.

See HINDU LAW, SUCCESSION.

———*Devolution of childless Widow's property.*] Property inherited from her deceased husband by a childless widow among the Nágar Vissa Vánia caste, at her death, intestate, devolves on the relations in blood, on the mother's side, of the husband, in preference to the heirs and next of kin of the widow.

JAIKISONDA'S GOPA'LDA'S *v.* HARKISONDA'S HULLOCHANDA'S ... 9

———*Disherison—Right of Females to inherit—Sapinda-relationship—Gotraja Sapindas.*] In the exercise of the testamentary powers amongst Hindus, the intention to disinherit must be clear and unambiguous. Mere bequests of special portions of the testator's estate to the heirs, without language of disherison, do not exclude him from the undisposed-of residue.

In the Presidency and Island of Bombay the wife is a *sapinda* as well as a *gotraja* of her husband, and, if he die (without leaving a son or grandson), she, on the subsequent death of his separated *sapinda*, and in the absence of any specially designated heir entitled to preference, ranks in the same place in the order of succession to the property of such separated *sapinda* as her husband would have occupied if he were living. Thus the widow of first cousin *ex parte paterna* of the deceased *propositus* was held prior in order of succession to a fifth male cousin *ex parte paterna* of the same.

Or, in other words, a wife becomes by her marriage a *sagotra sapinda* of her husband and his *gotraja sapindas*, and in that capacity succeeds as a widow to property which he would have taken as a *sapinda* before the male representative of a remoter branch.

LALLUBHA'I BA'PUBHA'I *v.* MA'NKUVARBA'I 388

INJUNCTION, MANDA'TORY—*Demolition of Building.*] The re-erection of his house by the defendant, notwithstanding notice from the plaintiff, so as to darken some of the principal rooms of the plaintiff's house, making them unfit for occupation during the day without artificial light, is an injury which cannot be adequately redressed by an award of damages, and against which the Court will grant relief by issuing a mandatory injunction, directing the defendant to pull down so much of the house as is necessary to stop the injury.

The probability of the defendant suffering a greater loss by the demolition of his house than the plaintiff, if his claim could be reduced to money, would suffer by being awarded a money compensation, is no ground for depriving the plaintiff of a mandatory injunction in his favour, except under special circumstances.

JAMNA'DA'S SHANKARLA'L *v.* ATMA'RA'M HARJIVAN... ... 133

INSOLVENT ACT (11 & 12 VIC., C. 21), S. 23—*Order and Disposition—True Owner—Constructive Trustee.*] N, an original allottee of five shares in the A Company, assigned them to B. No transfer was executed, and no notice of the assignment was given to the company, which subsequently went into liquidation. N became insolvent. B sued the liquidators of the company for the amount due in respect of the five shares on the first distribution of assets.

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Held that at the time of N's insolvency the plaintiff was the true owner of the shares within the meaning of s. 23 of the Indian Insolvent Act (11 & 12 Vic., c. 21), and that as he had omitted to give notice to the company of the assignment to him, and as he had procured no transfer to be executed in his favour which the company, under their articles of association, were bound to recognize, he had consented that the shares should remain in the order and disposition of N, and, consequently, the shares and the right to receive any distribution of assets in respect of them vested, upon N's insolvency, in the Official Assignee.

Semble—The principle that a person who is under an obligation to convey property to another is, in a Court of Equity, a trustee of such property for the latter, does not apply in cases where the reputed ownership clause of the Insolvent Act is in question.

Ex parte Littledale and *In re Sketchley* followed.

BHAVAN MULJI *v.* KA'VA'SJI JASA'WA'LA' 542

INSPECTION—*Civil Procedure Code (Act X of 1877), s.* 130.] Under s. 130 of the Civil Procedure Code (X of 1877) a Judge has no discretion to refuse to allow inspection of documents relating to matters in question in a suit, provided they are not privileged.

Confidential communications between principal and agent, relating to matters in a suit, are not necessarily privileged.

Held, in a suit for an injunction to restrain the defendant from using certain trade-marks, that telegrams and letters between the plaintiffs' firm in London and their managing agent in Bombay, relating to the subject-matter of the suit, were not privileged.

L. A. WALLACE *v.* F. G. JEFFERSON 453

INSTALMENTS, DECREE PAYABLE BY—*Limitation.*] A decree payable by instalments, with a proviso that, in default of payment of any one instalment, the whole amount of the decree shall become payable at once, is barred if application for execution be not made within three years from the date on which any one instalment fell due and was not paid.

The payment of instalments subsequently to default in payment of the first instalment at the date specified, does not give the judgment-creditor a fresh starting point.

DULSOOK RATTANCHAND *v.* CHUGON NARRUN 356

INSURANCE 550

See MARINE INSURANCE.

INTESTACY—*Claim against the estate of an Intestate on account of moneys paid after his death for the surviving members of his family* ... 75

See SUCCESSION ACT.

JUDGE—POWER OF, IN APPEAL.] A Judge is not permitted to make in appeal a different case for the appellant from that which he alleged for himself in the Court of first instance.

KACHUBHA'I BIN GULA'BCHAND *v.* KRISHNA'BA'I ... 635

JUDGMENT-CREDITOR, RIGHT OF A—*Execution—Imprisonment for Debt* 148

See CIVIL PROCEDURE CODE.

JUDGMENT-DEBTOR—*Execution—Imprisonment for Debt—Discharge from Arrest* 148

See CIVIL PROCEDURE CODE.

JUDICIAL PROCEEDING—*Civil Procedure Code (Act X of 1877) s.* 2.] The term "judicial proceeding," as used in s. 2 of the Code of Civil Procedure (Act X of 1877), must be understood to mean a

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judicial proceeding of the same nature as a suit or such proceedings as are referred to in ss. 333, 522, 526 and 531 of the Code. The definition given in the Code of Criminal Procedure (Act X of 1872) is not applicable.

DALPATBHA'I BHAGUBHA'I *v.* AMARSANG KHEMA'BHA'I ... 553

JURISDICTION OF DISTRICT COURT.] The District Court may, when the defendants reside within its local jurisdiction, try a suit for damages for and restrain by injunction an alleged illegal disturbance of the plaintiff's right to fish and use fishing stakes and nets fixed in the sea below low-water-mark and within three miles of it.

BA'BAN MAYA'CHA *v.* NA'GU SHRA'VUCHA' 19

————OF CIVIL COURTS.] A plaintiff, alleging that, as the hereditary *deshmukh* of certain *mahâls*, he was entitled to be paid directly by the ryots of these *mahâls* a percentage on the revenue thereon assessed, sued to recover a portion of such percentage which had been collected along with the revenue and retained by the Government: *Held* that the claim was "a suit relating to a grant of money or land-revenue," and, as such, excluded from the jurisdiction of the Civil Courts by s. 4 of "The Pensions Act, 1871."

VASUDEV SADASHIV MODAK *v.* THE COLLECTOR OF RATNA'GIRI... 99

JURISDICTION OF SMALL CAUSE COURT 84, 91
See SMALL CAUSE COURT.

JURORS. DISSENT OF COURT FROM VERDICT OF—*Criminal Procedure (Act X.) of 1872, sec. 263* 525
See DISSENT.

LETTERS PATENT, 1865, cl. 25 61
See EVIDENCE, CRIMINAL PROCEDURE ACT (HIGH COURT).

LIMITATION 67
See HINDU LAW.

————*Liability of the Share of one of next-of-kin for a debt due by him to the intestate, but barred at the date of the death of the latter.*] *Semble* that the rule followed by the Courts of Equity in England, whereby, notwithstanding the provision of the Statutes of Limitation, the share of one of the next-of-kin in the estate of an intestate while in the hands of the administrator, is liable for a debt due by the next-of-kin to the deceased, though barred at the date of the death of the latter, is to be applied in the Courts of British India. The rule laid down in *Graham* v. *Londonderry* (3 Atk. 393) with regard to a husband's rights over ornaments given to his wife by her father, applied to Parsis.

DHANJIBHAI BOMANJI GUGRA'T *v.* NAVAZBA'I 75

————PLEA OF—*Civil Procedure Code (Act VIII of 1859), ss. 26 & 32—Jurisdiction—Order of Revenue Officer—Cause of Action.*] A defence of limitation under Act XIV of 1859 cannot be raised for the first time after there has been a remand on special appeal from the decree of the Court which has heard the cause on remand.

Munshi Buzl Ruheem v. *Sreenath Bose* (6 Calc. W. R., 178, Civ. Rul.) followed; *Kuria* v. *Gururáv* (9 Bom. H. C. Rep., 282) distinguished.

Parker v. *Elding* (1 East. 352) and *Lila* v. *Vasudev* (11 Bom. H. C. Rep., 283), distinguished.

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Semble, per WESTROPP, C.J., doubting *Saluji* v. *Rajsanji* (2 Bom. H. C. Rep. 162, A.C.J.), and *Davlata* v. *Beru* (4 Bom. H. C. Rep. 197, A.C.J.), the Court ought not, even upon a special appeal in a case in which there has not been any remand, so to raise such question.

Per MELVILL, J.—Clause 16 of s. 1 of Act XIV of 1859 extends to all suits in which a declaratory decree, and nothing more, is sought.

Per NA'NA'BHAI HARIDA'S, J.—That clause does not extend to a suit in which the declaration sought is of a right in immoveable property.

MORU BIN PATLA'JI *v.* GOPA'L BIN SATU 120

LIMITATION ACT. *Breach of covenant for title.*] S. L., by a deed of gift of 16th February 1847, granted and assured to S., his daughter, certain immoveable property by a subsequent unregistered deed of gift of 15th July 1865. S. L. purported, in consideration of natural love and affection, to grant and convey the same property, the value of which exceeded Rs. 100, to B. R., the husband of S., his heirs, executors, administrators and assigns. The last-mentioned deed contained covenants on the part of S. L., his heirs, executors, and administrators, with B. R., his heirs, executors, administrators and assigns, for title to "the hereditaments and premises hereinbefore expressed to be hereby granted and assured unto and to the use of the said B. R., his heirs, executors, administrators and assigns." S. died in the life-time of B. R., who in 1867 mortgaged the premises comprised in the deed of 15th July 1865, and died in 1868. In 1870 the mortgagee sold the premises by auction, under the power of sale contained in the mortgage-deed; the plaintiff became the purchaser; and the mortgagee, on 24th March 1871, executed to him a conveyance of the premises, which were then in the possession of the surviving members of the family of B. R. and S. The plaintiff having failed in a suit in ejectment against the parties in possession, who relied on the prior gift to S., sued the representatives of S. L. for damages for breach of the covenants for title contained in the unregistered deed of 15th July 1865.

The breach of the grantor's covenant, so far as related to his present right to convey, took place on the day the conveyance to the covenantee was executed, viz., 15th July 1865, and, consequently, a suit in respect of such breach was barred; but the covenant for quiet possession, admitting of a continuing breach, was not barred so long as the breach continued, and that of the covenant for further assurance there had been no breach at all, as such covenant would be broken only by refusal on the part of the covenantor or his representatives to execute a further assurance when required so to do by the covenantee or his representatives.

RAJU BALU *v.* KRISHNARAV RAMCHANDRA 273

——————(XIV OF 1859), s. 1, cls. 14 & 16—*Maintenance.*] The provision of the Limitation Act of 1859, applicable to suits brought under that Act for maintenance not chargeable upon any estate, is cl. 16 of s. 1, which gives six years from the accruer of the cause of action. The cause of action in such cases does not arise until there has been a demand and refusal of maintenance.

KALO NILKANTH *v.* LAKSHMIBA'I 637

——————sec. 1, cls. 12 & 16 AND s. 2—*Adverse Possession.*] An executor, who by the will is made an express trustee for certain purposes, is, as to the undisposed of residue, a

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trustee, within the scope of s. 2 of Act XIV of 1859, for the heir or heirs of the testator.

LALLUBHA'I BA'PUBHA'I *v.* MA'NKUVARBA'I 388

LIMITATION ACT (XIV OF 1859), sch. II, art. 158—*Application for Restitution by a person dispossessed—Mode of computing Period of Limitation.*] In calculating the period of limitation prescribed in sch. II of Act IX of 1871 for application as well as for suits and appeals, the day on which the order or decree appealed against was made, should be excluded.

Consequently, where a person, having been dispossessed of property held by him under a mortgage on the 14th of December 1875, applied on the 14th January of 1876 for restitution, the 13th having been a Court holiday, it was held that his application was within the limitation of thirty days prescribed by art. 158, sch. II of Act IX of 1871.

V. K. GURJAR *v.* V. D. BARVE 673

——————(IX of 1871), sch. II, arts. 75 & 167—*Limitation Act (XV of 1877), sch. II, art.* 179, *cl.* 4—*Decree payable by Instalments.*] A decree payable by instalments, with a proviso that, in default of payment of any one instalment, the whole amount of the decree shall become payable at once, is barred, if application for execution be not made within three years from the date on which any one instalment fell due, and was not paid.

The payment of instalments subsequent to default in payment of the first instalment at the date specified, does not give the judgment-creditor a fresh starting point.

DULSOOK RATTANCHAND *v.* CHUGON NARRUN 356

——————(IX OF 1871), s. 20—*Promise—Acknowledgment—Recovery of barred Debts.*] Act IX of 1871, s. 20, cl. (*a*), does not prevent a plaintiff from maintaining a substantive action on a promissory note passed to secure the amount due on an old note which was barred by limitation at the time of the making of the new, the plaintiff's right to bring such action being recognized by the later enactment, Act IX of 1872, s. 25, cl. 3.

CHATUR JAGSI *v.* TULSI 230

—————— sch. II, art. 167, cl. 4.] The "application" spoken of in art. 167, cl. 4, of sch. II to Act IX of 1871 is not merely such an application as is contemplated by s. 212 of Act VIII of 1859, but includes an application to keep in force a decree or order.

The language of art. 167, cl. 4, of sch. II to Act IX of 1871 is wide enough to include any application to enforce or keep in force decrees or orders, and, consequently, an application to enforce or keep in force a decree by the attachment of a portion of the property of the defendant, will keep the decree alive against the residue of his property or his person.

An order for attachment of a pension in satisfaction of a decree obtained on the 10th December 1863, was made on 15th April 1869. After the passing of the Pensions Act (XXIII of 1871), the Deputy Collector refused to continue paying the pension to the decree-holder, and returned to the Court the warrant of execution issued under the order of 16th April 1869, and an order finally disposing of the application for attachment was made on 14th June 1872. On 19th June 1872 the decree-holder presented a fresh application, praying that the attachment of the pension might be continued, and a letter be written to the Collector, directing him

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to continue to pay the pension to the decree-holder, as directed by the order of 16th April 1869.

Held that such last-mentioned application came within cl. 4 of art. 167 of sch. II to Act IX of 1871, and that, consequently, an application on 24th July 1874, for execution of the decree of 10th December 1863, was not barred.

Held, also, that the decree might properly be enforced against property of the defendant, mentioned in the application of 1874, other than the property mentioned in the applications of 1869 and 1872.

JAMNA'DA'S *v.* LALITARA'M... 294

MAHA'LKARI, SANCTION OF PROSECUTION OF.] *A Mahálkari* falls within the class of public servants contemplated in paragraph 1 of s. 466; a sanction for his prosecution by the District Magistrate is, therefore, sufficient.

IMPERATRIX *v.* LAKSHMAN SAKHA'RA'M 481

MAINTENANCE—*Widow—Charge on Estate in hands of a Purchaser with notice* 494

See HINDU LAW.

———*Nephew's Widow living apart from her husband's family* 573

See HINDU LAW.

——— RIGHT OF ADULT SON TO.] If a Hindu father possesses practically no partible property, his legitimate son, though adult, and suffering from no disability to inherit, is entitled to maintenance from him.

RA'MCHANDRA SAKHA'RA'M *v.* SAKHA'RA'M GOPA'L ... 346

———*Illegitimate Son.*] The right of an illegitimate son to maintenance out of his deceased father's property, cannot be decided in a suit which concerns a portion only of that property, and to which all persons in possession of the rest of the father's property are not parties.

NA'RA'YAN BHA'RTHI *v.* LAVING BHA'RTHI 140

———AMOUNT OF, GRANTED TO HINDU WIDOW.] A Hindu widow is not entitled to a larger portion of the annual produce of the family property as maintenance than the annual proceeds of the share to which her husband would have been entitled on partition, if he were living.

MA'DHAVRA'O KESHAV TILAK *v.* GUNGA'BA'I 639

———*Suit for, when cognizable by Small Cause Courts in Mufussal—Nature of right to.*] In the absence of any special bond or other contract for the payment of maintenance, a suit for maintenance is not cognizable in a Court of Small Causes in the Mufussal.

Ordinarily, the right to maintenance does not rest upon contract. It is a liability created by the Hindu law, and arises out of the jural relation of the Hindu family. It is enforceable in numerous instances in which there is no connexion with contract.

Nobin Kalee Debea v. *Bindoobashinee Debea* (5 Calc. W. R. 5 [Sm. C. C. Ref.]) followed.

SIDLINGA'PA' *v.* SIDA'VA' 624

———*Suit by Brother's Widow—Jurisdiction of Small Cause Court.*] In a suit by a Hindu widow against her husband's brother for an allowance as maintenance and for the expenses of a pilgrimage,

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Held (following *Sidlingápá* v. *Sidává kom Sidlingápá*) that the suit, although for a sum under Rs. 500, was not cognizable by a Court of Small Causes under Act XI of 1865, there being no allegation that the maintenance claimed was secured by bond or other special contract.

Held, also, (following the case of *Savitribái* v. *Luximibái*) that the defendant was not liable, inasmuch as he was not in possession of any ancestral property, and had not received any property from the plaintiff's husband.

APA'JI CHINTA'MA'N *v.* GUNGA'BA'I 632

MAINTENANCE, WIFE'S RIGHT TO SEPARATE.] Although by Hindu law a husband is bound to maintain his wife, she is not entitled to a separate maintenance from him, unless she proves that by reason of his misconduct or by his refusal to maintain her in his own place of residence, or other justifying cause, she is compelled to live apart from him.

SIDLINGA'PA' *v.* SIDA'VA' 634

———*Limitation Act* (*XIV of* 1859), *s.* 1, *cls.* 14 *&* 16.] The provision of the Limitation Act of 1859, applicable to suits brought under that Act for maintenance not chargeable upon any estate, is cl. 16 of *s.* 1, which gives six years from the accruer of the cause of action. The cause of action in such cases does not arise until there has been a demand and refusal of maintenance.

KA'LO NILKANTH *v.* LAKSHMIBA'I 637

MANDATORY INJUNCTION 133
See INJUNCTION.

MANU, INSTITUTES OF 388
See HINDU LAW BOOKS.

MARINE INSURANCE—*Policy, Construction of.*] In a policy of insurance, effected in Bombay upon goods shipped from Calcutta to Jeddah, two clauses were inserted in writing, the rest of the policy being in the ordinary English printed form. The first written clause was in English as follows :—"Warranted free of particular average, unless stranded, sunk, or burnt." The second was written on the margin of the policy in the Gujarátbi language, and was to the following effect :—"Insurance upon the goods to be without damage. The loss arising from damage is to be on the head of the owner of the goods."

Held—The underwriters of such a policy are liable to the insurer for a particular average loss where the vessel, in which the insured goods are shipped, is stranded, sunk or burnt.

HAJEE ESMA'IL *v.* SHA'MJEE POONJA'NI 550

MARRIAGE, ASURA FORM OF—*Nagar Vissa Vania Caste—Palu.*] The Hindu law, at least as evidenced by usage, though it permits the Asura form of marriage among the mercantile and servile classes, does not prohibit to those classes the more approved forms of marriage.

The form of marriage in use among the Nágar Vissá section of the Vánia caste corresponds to one or other of the approved forms, and not to the Asura; and the giving of *palu* does not constitute a purchasing of the bride.

JAIKISONDA'S GOPA'LDA'S *v.* HARKISONDA'S HULLOCHANDA'S ... 9

MAYUKHA 388
See HINDU LAW BOOKS.

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MITA'KSHARA' 388
See HINDU LAW BOOKS.

MOFUSSAL, SALE OF MORTGAGED LAND IN 1
See MORTGAGE.

MORTGAGE—*Gahán Láhán Mortgage—Mortgage convertible into a Sale—Redemption—Alienation of Land—Sale.*] Where the grantor executed to the grantee a document reciting a mortgage by the former to the latter of certain lands for Rs. 125, on which Rs. 200 were then due from the grantor to the grantee, and containing an agreement that the grantee should pay Rs. 75 to another creditor of the grantor, and purporting, in consideration of Rs. 275 so made up, absolutely to sell and convey the mortgaged lands to the grantee, and the grantee executed to the grantor a document of the same date reciting the sale of the mortgaged lands by the grantor to the grantee for the consideration of Rs. 275, and covenanting that the grantee should reconvey to the grantor the lands, the subject of the grant, if the grantor should repay to the grantee the sum of Rs. 275 within a certain period, and providing that, in case of default in such payment within such period, the covenant for reconveyance should become null.

Held that the transaction was a sale and not a mortgage, and that, consequently, the grantor had no right to redeem the lands after the expiration of the period so fixed for the payment of Rs. 275 by the grantor to the grantee, there being no evidence or allegation that, at the date of the execution of the two documents, Rs. 275 were an insufficient consideration for the sale of the lands, nor any stipulation that the grantee should account for the rents and profits received by him, or that the grantor should pay interest on the Rs. 275, nor anything to show that the grantor remained in possession after the execution of the two documents, or that subsequently to that time any advances were made by the grantee to the grantor on the security of the lands, nor anything in either document which pointed to a right on the part of the grantee to recover from the grantor the sum of Rs. 275, or any part of it, before, at, or after the period named for the repurchase.

The law as laid down in *Rámji* v. *Chinto* (1 Bom. H. C. Rep. 199), viz., once a mortgage always a mortgage, is still in force, in the Presidency of Bombay, with regard to mortgages containing clauses of conditional sale, whether executed before or after 1858.

The ancient law and usage of the country respecting *gáhán láhán* mortgages, and generally the alienation of immoveable property, discussed.

BA'PUJI APA'JI *v.* SENA'VARA'JI MARVA'DI 231

———*Decree—Sale—Right to Emblements.*] On the 14th of July 1876, B obtained a decree against D, directing D to pay the amount advanced upon a mortgage of D's lands within six months from the date of decree, or, in default of payment, the lands to be sold with liberty to B to bid at the sale. Default having been made, the lands were sold on the 21st of June 1877, and B became the purchaser. At the time of the sale the lands were in the occupation of D's tenants under an agreement to give to D a moiety of the crops. On the 11th December 1877, P, another judgment-creditor of D, attached the crops on those lands which had been cut and stored by D's tenants since the date of the sale.

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Held that by the sale to B, all right, title, and interest of D, including his right to the moiety of the crops in the hands of his tenants, passed to B, and no residual right remained in D on which P's execution could operate, the crops not having been actually carried away and appropriated by D.

LAND MORTGAGE BANK OF INDIA (LIMITED), *v.* VISHNU GOVIND PA'TANKAR 670

MORTGAGE—*Injunction—Power of Sale.*] When property mortgaged is situated in the mofussal, but the parties to the mortgage are resident in Bombay, and the instrument of mortgage is in the English form, the parties must be held to have contracted according to English law, and to be entitled to enforce their rights according to that law. In such a case the mortgagee can exercise a power of sale contained in the mortgage-deed, and cannot be restrained from exercising such power, merely because the mortgagor has filed a suit for redemption. The mortgagor can only stay the sale *pendente lite* by paying the amount due into Court, or by giving *primâ facie* evidence that the power of sale is being exercised in a fraudulent or improper manner, contrary to the terms of the mortgage.

JAGJIVAN NA'NA'BHAI *v.* SHRIDHAR BA'LKRISHNA NAGARKAR. 252

———*Registration—Sale—Possession—Priority.*] A registered mortgage without possession has priority over a subsequent registered sale and conveyance with possession.

By a duly-registered deed, D mortgaged land to the plaintiff with power of sale. On default made by D, the plaintiff brought a suit for a sale of the mortgaged land; but, pending the suit, D sold the land to the defendant, who registered his conveyance and entered into possession. The plaintiff subsequently obtained a decree, and at the execution sale became himself the purchaser. In the present suit he sought to recover possession from the defendant.

Held that the plaintiff was entitled to recover.

His rights as mortgagee included the right of bringing to sale the property as it subsisted at the date of the mortgage. The property having been so brought to sale, the purchaser acquired a right free from any created subsequently to the mortgage and subject to it.

S. B. SHRINGARPURE *v.* S. B. PETHE 662

———*Power of Sale—Sale of Mortgaged Land in Mofussal—Deed in English form.*] A sale, without the intervention of a Court of Justice, of mortgaged lands situate in the Mofussal of Bombay, under a power of sale contained in an indenture of mortgage in the ordinary English form, is valid, if due notice be given to the mortgagor of the mortgagee's intention to sell, and the sale be fairly conducted.

Position of a mortgagee selling under his power of sale explained.

PITA'MBER NA'RA'YANDA'S *v.* VANMALI SHA'MJI 1

———*Deed of Assignment of Mortgage—Consideration—Registration.*] A deed of assignment, for a consideration of less than Rs. 100, of a mortgage for a consideration of Rs. 100 or upwards, does not need registration.

Vasudev v. *Râmâ* (11 Bom. H. C. Rep., 149), *Rohinee Debia* v. *Shib Chunder Chutterjee* (15 Cal. W. R., 558, Civ. Rul.) followed.

SATRA KUMA'JI *v.* VISRA'M HASGA'VDA 97

———*Sale convertible into a Mortgage.*] Where a deed, which on the face of it was described as a mortgage, stated that the grantee was already in possession under a previous mortgage by the

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grantor, and was under the second deed to receive the profits in liquidation of interest so far as they would go, and that the grantor was not to be liable to repay the principal money or such balance of interest (if any) as might accrue upon it, unless he adopted a son, and the grantee, unless that event happened, was to enjoy the property conveyed in right of purchase for the sum (principal and interest) due to him,

Held that the deed was a sale liable to be converted into a mortgage, and not a mortgage liable to be converted into a sale.

Howard v. *Harris*, *Rámji* v. *Chinto*, *Shankurbhái* v. *Kassibhái*, referred to and distinguished.

SUBHA BHA'T *v.* VASUDEVBHA'T 113

MORTGAGE—*Sale—Estoppel.*] The three senior members of an undivided Hindu family—the remaining members of which had disappeared—setting forth a ground of necessity, executed to the plaintiff, in November 1870, a mortgage, duly registered, of a piece of land which formed part of the family estate.

Certain judgment-creditors of the absent member subsequently attached and sold his share in the said land under their decree. The plaintiff's undivided son purchased it, and in 1872 resold his right, title, and interest in it to the defendant's father, without disclosing the fact of his father's mortgage, but without any active fraud on the part of himself or his father to suppress the fact from the knowledge of his purchaser.

In 1874 the plaintiff obtained a decree upon his mortgage, and attached the land.

In a suit by the plaintiff to establish his right as against all the land included in his mortgage,

Held that the mortgage being, under the circumstances, a valid one, the sale of the absent son's share was subject to the lien created thereby, which lien was not disturbed by the purchase and subsequent sale of the share by the son of the mortgagee. The origin of the son's title was stated in the deed of sale to the new purchaser, who, by the fact of its being a sale of a *share*, was put upon inquiry.

The mere want of disclosure, by the plaintiff's undivided son, of his father's mortgage, was not enough to create an estoppel against his father seeking to establish his claim under the mortgage.

R. S. JOSHI *v.* L. B. JOSHI 650

MUNICIPAL ACT (BOMBAY DISTRICT) VI OF 1873, ss. 36 & 39.] Non-compliance with notices issued by the Municipality under s. 36 or cl. 1 of s. 39 of the Bombay District Municipal Act No. VI of 1873 is not an offence punishable under the Act, as cl. 1 of s. 74 of that Act does not apply to either of those provisions. The latter clause applies only to the 2nd clause of s. 39.

In re TUKA RA'M VITHAL 527

NA'GAR VISSA VA'NIA CASTE ... ...
See MARRIAGE, INHERITANCE.

NUDUM PACTUM—Vakil and Client.] An agreement, executed by a client to his vakil, after the latter had accepted a *vakálátnámá* to act for the former in a certain suit, whereby the client bound himself to pay to the vakil, in the event of his conducting the suit to a successful termination, a certain sum in addition to the vakil's full fees,—*held nudum pactum*, and a suit founded upon it dismissed as unsustainable

RA'MCHANDRA CHINTA'MA'N *v.* KA'LU RA'JU 362

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NUISANCE—*Obstruction to a Public Road—Right of Suit—Injunction.*] Plaintiffs, who were Mussulmáns, sued to establish their right to carry *tabuts* in procession along a certain road to the sea, and alleged that the defendants (also Mussulmáns) obstructed them in doing so. The plaint, however, did not allege any personal loss or damage to the plaintiffs arising from the obstruction. Both the lower Courts found, as a fact, that the road along which plaintiffs desired to carry their *tabuts* to the sea, was a public road.

Held in special appeal that plaintiffs could not maintain a civil suit in respect of such obstruction, unless they could prove some particular damage to themselves personally in addition to the general inconvenience occasioned to the public. The mere absence of the religious or sentimental gratification arising from carrying *tabuts* along a public road, is not any such particular loss or injury as would be sufficient, according to English and Indian precedents, to sustain a civil action.

Authorities as to what constitutes special damage sufficient to sustain a civil suit in such cases, referred to.

SATKU VALAD KADIR *v.* IBRA'HIM VALAD MIRZA 457

OBSTRUCTION TO A PUBLIC ROAD 457
See NUISANCE.

OFFICE OF *CHALVADI*, DISTURBANCE OF—*Action to recover Gratuities received by Intruder—Caste Question.*] Plaintiff was the hereditary holder of the office of *chalvadi*, or bearer, on public occasions, of the insignia or symbols of the Lingáyet caste at Bágalkot, in the District of Belgaum. No fees, as of right, were appurtenant to that office, but voluntary gratuities might be given to the *chalvadi*. In an action brought by plaintiff against defendant as an intruder upon his (plaintiff's) office,

Held that the action would not lie, if brought merely for the gratuities as moneys alleged to be received by defendant to the use of plaintiff.

Held, also, that the plaintiff's claim to be *chalvadi* of the Lingáyet caste at Bágalkot was a caste question, within the meaning of the unrepealed portion of cl. 1, s. 21, of Reg. II of 1827.

SHANKARA *v.* HANMA' 470

ORDER AND DISPOSITION 542
See INSOLVENT ACT.

PALU—Marriage.] The form of marriage in use among the Nágar Vissa Vánia caste corresponds to one or other of the approved forms, and not to the Asura, and the giving of *palu* does not constitute a purchasing of the bride.

JAIKISONDA'S GOPALDA'S *v.* HARKISONDA'S HULLOCHANDA'S ... 9

PA'RSI SUCCESSION ACT (XXI of 1865).] In excluding by s. 8 of the Pársi Succession Act, from application to Pársis, s. 42 of the Indian Succession Act, which repeals the English rule as to advancement contained in the statute of distribution, s. 5, it was not the intention of the Legislature to preserve the last-mentioned rule in force for the Pársi community.

Semble—that the rule followed by the Courts of Equity in England, whereby, notwithstanding the provisions of the Statutes of Limitation, the share of one of the next-of-kin in the estate of an intestate, while in the hands of the administrator, is liable for a debt due by the next-of-kin to the deceased, though barred at the date of the death of the latter, is to be applied in the Courts of British India.

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The rule laid down in *Graham* v. *Londonderry* (3 Atk. 393) with regard to a husband's rights over ornaments, given to his wife by her father, applied to Pársis.

DHANJIBHAI BOMANJI GUGRA'T *v.* NAVAZBA'I 75

PASTURAGE, RIGHT TO—*Grazing—Bombay Act I of* 1865, *s.* 32.] Plaintiff erected a hut on public ground, in a village in the district of Thána, and lived there annually for a few months while his cattle grazed on the public grazing ground in that village. He was not the owner or lessee of any land in the village. On being prevented by the Collector of Thána from thus grazing his cattle, plaintiff brought a suit against that officer for a declaration of his right to graze his cattle within the limits, not only of that village, but of any other village in the district of Thána.

Held that plaintiff was not entitled to any such right.

The phrase "village cattle" in s. 32 of Bombay Act I of 1865 does not include the cattle of any roving grazier who may choose to squat for a few months on the public ground of a village. That Act does not vest the right of sanctioning such a diversion of the village grazing ground in the villagers themselves, but in the Revenue Commissioner, whose consent must be obtained.

THE COLLECTOR OF THA'NA' *v.* BA'L PA'TEL 110

PENAL CODE (INDIAN), s. 217—*Charge—Vagueness in Charge.*] The accused was charged under s. 217 of the Indian Penal Code; but the charge did not distinctly state what the direction of the law was, which he disobeyed, and how he disobeyed it.

Held that, when accused has been convicted on a charge expressed in vague terms, the prosecution on appeal should be limited to the particular sense in which the charge has been understood at the trial.

IMPERATRIX *v.* BA'BAN KHA'N 142

PENSION, IMPARTIBILITY OF.] *Semble* that a political pension granted in substitution of a resumed *saranjám* is so likewise. The Pensions Act (XXIII of 1871) prevents a Civil Court from declaring such a pension to be partible, unless the Collector should authorize it to do so; and the fact that the Collector authorizes a suit for maintenance out of such a pension, affords no ground for presuming that he authorizes a suit for the partition of the pension.

RAMCHANDRA SAKHARAM *v.* SAKHA'RAM GOPA'L 346

PENSIONS ACT (XXIII OF 1871)—*Jurisdiction—Deshmukh.*] A plaintiff, alleging that, as the hereditary *deshmukh* of certain *máhâls*, he was entitled to be paid directly by the ryots of these *máhâls* a percentage on the revenue thereon assessed, sued to recover a portion of such percentage which had been collected along with the revenue and retained by the Government: *Held* that the claim was "a suit relating to a grant of money or land-revenue," and, as such, excluded from the jurisdiction of the Civil Courts by s. 4 of the Pensions Act (XXIII of 1871.)

VA'SUDEV SADA'SHIV MODAK *v.* THE COLLECTOR OF RATNA'GIRI ... 99

———————] The Pensions Act (XXIII of 1871) is not retrospective.

An order for attachment of a pension in satisfaction of a decree, obtained on the 10th December 1863, was made on 15th April 1869. After the passing of the Pensions Act (XXIII of 1871), the Deputy Collector refused to continue paying the pension to the decree-holder, and returned to the Court the warrant of execution issued under the order of 16th April 1869; and an order finally dis-

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posing of the application for attachment was made on 14th June 1872. On 19th June 1872 the decree-holder presented a fresh application, praying that the attachment of the pension might be continued, and a letter be written to the Collector, directing him to continue to pay the pension to the decree-holder, as directed by the order of 16th April 1869.

Held that such last-mentioned application came within cl. 4 of art. 167 of sch. II to Act IX of 1871, and that, consequently, an application on 24th July 1874, for execution of the decree of 10th December 1863, was not barred.

Held, also, that the decree might properly be enforced against property of the defendant, mentioned in the application of 1874, other than the property mentioned in the applications of 1869 and 1872.

JAMNA'DA'S *v.* LALITARA'M 294

PLAINT, AMENDMENT OF 116
See PRACTICE.

POSSESSION, ADVERSE 388
See LIMITATION ACT.

POSSESSION—NECESSITY OF, TO COMPLETE TITLE—*Registration.*] Delivery of possession of the property sold is, under the Hindu law, essential to complete the title of the vendee against a third party purchasing with possession from the same vendor without notice of the prior transaction.

The rule prevails as between competing conveyances, both of which have been registered.

Authorities and Hindu-law texts on the subject reviewed.

LALUBHA'I SURCHAND *v.* BA'I AMRIT 299

PRACTICE—*Amendment of Plaint.*] Where the holder of shares in a company was described in the list of contributories, against whom a balance order by the Court of Chancery had been made, as "Devj Bhánji, cotton merchant," and as being sued "in his own right,"

Held that the plaintiffs' company could not be allowed to give evidence that the shares were, in fact, held by a firm consisting of two individuals named, respectively, Bhánji Zutani and Devji Hemráj; nor could the plaintiffs be allowed, at the hearing of the appeal, to amend their plaint, originally framed against both partners, with a view to making the firm liable for the amount of the calls so as to sue Bhánji Zutani only, who alone was alleged to have signed the articles and memorandum of association in the name of Devji Bhánji, and to make him personally liable as the holder of the shares.

Weikersheim's Case (L.R. 8 Ch. Ap. 831) distinguished.

THE LONDON, BOMBAY AND MEDITERRANEAN BANK, (LIMITED,) *v.* BHA'NJI ZUTA'NI 116

———*Setting aside Ex-parte Decree—Substituted Service of Summons.*] Where substituted service of the summons is ordered under s. 82 of the Civil Procedure Code (Act X of 1877), a sufficient time ought, under s. 84, to be given for notice of the fact to reach the defendant, wherever he may be; and, if an *ex-parte* decree be obtained by the plaintiff, the Court, on being satisfied that the time fixed was insufficient, will set aside the decree.

MIRZA ALLY BEBANEE *v.* SYED HYDER HOOSEIN 449

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PRACTICE—*Costs—Administration.*] An applicant for letters of administration to the estate of a widow, having concealed the existence and claims, of which he was aware, of the relatives of the deceased husband of the widow, on the application being dismissed was ordered to pay the costs of the application and of the caveats entered by some of the relatives of the deceased husband.

JAIKISONDA'S GOPA'LDA'S *v.* HARKISONDA'S HULLOCHANDA'S ... 9

———*Power of Judge in Appeal*] A Judge is not permitted to make, in appeal, a different case for the appellant from that which he alleged for himself in the Court of first instance.

KACHUBHAI BIN GULA BCHAND *v.* KRISHNA'BA'I... 635

———IN SMALL CAUSE COURT—*Leave to amend Summons.*] In a case involving a question of adverse title, the plaintiff should be allowed to amend the summons issued under s. 91 of Act X of 1850, so as to render it conformable with a claim under s. 25 of Act XXVI of 1864, if the summons were issued in the mistaken form by the fault of the Clerk of the Court, and not of the plaintiff.

NOWLA' OOMA *v.* BALA' DHURMAJI 91

PRACTICE—

See APPEAL.

———*Defence of Limitation.*] A defence of limitation under Act XIV of 1859 cannot be raised, for the first time, after there has been a remand on special appeal from the decree of the Court which has heard the cause on remand.

Munshi Buzl Ruheem v. *Sreenath Bose* (6 Calc. W. R., 178, Civ. Rul.) followed; *Kuria* v. *Gururav* (9 Bom. H. C. Rep. 282) distinguished.

Parker v. *Elding* (1 East. 352) and *Lila* v. *Vasudev* (11 Bom. H. C. Rep., 283) distinguished.

Semble, per WESTROPP, C.J., doubting *Saluji* v. *Rajsanji* (2 Bom. H. C. Rep. 162, A. C. J.), and *Davlata* v. *Beru* (4 Bom. H. C. Rep. 197, A.C.J.), the Court ought not, even upon a special appeal in a case in which there has not been any remand, so to raise such question.

Per MELVILL, J.—Clause 16 of s. 1 of Act XIV of 1859 extends to all suits in which a declaratory decree, and nothing more, is sought.

Per NA'NA'BHA'I HA'RIDA'S, J.—That clause does not extend to a suit in which the declaration sought is of a right in immoveable property.

MORU BIN PATLA'JI *v.* GOPA'L BIN SATU 120

———*Inspection—Civil Procedure Code (Act X of 1877), s 130.*] Under s. 130 of the Civil Procedure Code (Act X of 1877) a Judge has no discretion to refuse to allow inspection of documents relating to matters in question in a suit, provided they are not privileged.

Confidential communications between principal and agent, relating to matters in a suit, are not necessarily privileged.

Held, in a suit for an injunction to restrain the defendant from using certain trade-marks, that telegrams and letters between the plaintiff's firm in London and their managing agent in Bombay, relating to the subject-matter of the suit, were not privileged.

L. A. WALLACE *v.* F. G. JEFFERSON 453

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PROFESSIONAL ASSISTANCE — *Mandatory Injunction — Demolition of building.*] Where a mandatory injunction was issued, ordering the defendant to pull down so much of a house as was necessary to remove an obstruction complained of by the plaintiff, the Court executing the decree was directed to employ a professional man agreed on by the parties if they could agree, or nominated by the Court if they could not, to determine what demolition was necessary

JAMNA'DA'S SHANKARLAL *v.* ATMA'RA'M HARJIVAN 133

PROMISSORY NOTE—*Limitation.*] Act IX of 1871, s. 20, cl. (*a*), does not prevent a plaintiff from maintaining a substantive action on a promissory note passed to secure the amount due on an old note which was barred by limitation at the time of the making of the new, the plaintiff's right to bring such action being recognized by the later enactment, Act IX of 1872, s. 25, cl. 3.

CHATUR JAGSI *v.* TULSI 230

PROSECUTION, COMMENCEMENT OF A.] A prosecution commences when a complaint is made, the reception of the complaint being a stage of the judicial proceedings towards conviction.

IMPERATRIX *v.* LAKSHMAN SAKHA'RA'M 481

REGISTRATION.—*Assignment—Consideration.*] A deed of assignment, for a consideration of less than Rs. 100, of a mortgage for a consideration Rs. 100 or upwards, does not need registration.

SATRA KUMA'JI *v.* VISRA'M HASGA'VDA 97

———*Delivery of possession.*] The rule of Hindu law which makes delivery of possession necessary to complete the title of the vendee, prevails as between competing conveyances both of which have been registered.

LALUBHAI SURCHAND *v.* BAI AMRIT 299

———*Evidence.—Power of Judge in Appeal.*] A deed of partition was executed among three brothers, C, N and B, on the 19th March 1867, but was not registered. It recited that, some years previously to its date, a division of the family property, with the exception of three houses, had been effected, and it purported to divide those houses among the brothers. In a suit brought by C's widow for the recovery of the house which fell to C's share,

Held that, although the deed did not exclude secondary evidence of the partition of the family property previously divided, yet it affected to dispose of the three houses by way of partition made on the day of its execution, and, therefore, secondary evidence of its contents was inadmissible under s. 91 of the Indian Evidence Act.

A Judge is not permitted to make, in appeal, a different case for the appellant from that which he alleged for himself in the Court of first instance.

KACHUBHAI BIN GULA'BCHAND *v.* KRISHNA'BA'I 635

———*Mortgage—Sale—Possession—Priority.*] A registered mortgage without possession has priority over a subsequent registered sale and conveyance with possession.

By a duly-registered deed, D mortgaged land to the plaintiff with power of sale. On default made by D the plaintiff brought a suit for a sale of the mortgaged land; but, pending the suit, D sold the land to the defendant, who registered his conveyance and entered into possession. The plaintiff subsequently obtained a

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decree, and at the execution sale became himself the purchaser. In the present suit he sought to recover possession from the defendant.

Held that the plaintiff was entitled to recover. His rights as mortgagee included the right of bringing to sale the property as it subsisted at the date of the mortgage. The property having been so brought to sale, the purchaser acquired a right free from any created subsequently to the mortgage, and subject to it.

S. B. SHRINGARPURE *v.* S. B. PETHE 662

REGISTRATION ACT (VIII OF 1871), s. 17—*Act XVI of* 1864, *s.* 13—*Act XX of* 1866, *s.* 17—*Optional Registration—Determination of Value—Consideration.*] The value of the right, title, or interest created by a mortgage is estimated by the amount of the principal money thereby secured.

The words "or in future" in s. 17 of Act XX of 1866 and s. 17 of Act VIII of 1871 have reference to estates in remainder or in reversion in immoveable property, or to estates otherwise deferred in enjoyment, and not to interest payable in future on principal moneys lent on the security of immoveable property.

NA'NA' BIN LAKSHMA'N *v.* ANANT BA'BA'JI 353

———————————s. 49—*Receipt—Release.*] *Held* that the Court is bound in regular appeal to entertain an objection that a document is invalid for want of registration, even though no objection may have been raised to its admissibility in the Court below.

Held, also, that a document, called a receipt, but intended to be used to prove the release of a claim secured by mortgage, required registration under s. 49 of Act VIII of 1871, inasmuch as it affected immoveable property.

BA'SAWA' *v.* KA'LKA'PA' 489

———————————(III OF 1877), ss. 17 & 49—*Evidence—Covenant—Voluntary Settlement—Patent Ambiguity—Title—Estoppel—Damages—Consideration—Limitation.*] S. L., by a deed of gift of 16th February 1847, granted and assured to S., his daughter, certain immoveable property. By a subsequent unregistered deed of gift of 15th July 1865, S. L. purported, in consideration of natural love and affection, to grant and convey the same property, the value of which exceeded Rs. 100, to B. R., the husband of S., his heirs, executors, administrators and assigns. The last-mentioned deed contained covenants, on the part of S. L., his heirs, executors, and administrators, with B. R., his heirs, executors, administrators and assigns, for title to "the hereditaments and premises hereinbefore expressed to be hereby granted and assured unto and to the use of the said B. R., his heirs, executors, administrators, and assigns." S. died in the lifetime of B. R., who, in 1867, mortgaged the premises comprised in the deed of 15th July 1865, and died in 1868. In 1870 the mortgagee sold the premises by auction, under the power of sale contained in the mortgage deed; the plaintiff became the purchaser; and the mortgagee, on 24th March 1871, executed to him a conveyance of the premises, which were then in the possession of the surviving members of the family of B. R. and S. The plaintiff having failed in a suit in ejectment against the parties in possession, who relied on the prior gift to S., sued the representatives of S. L. for damages for breach of the covenants for title contained in the unregistered deed of 15th July 1865.

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Held, 1*st*, that the provisions of Act III of 1877 apply to all documents tendered in evidence on or after 1st April 1877.

2*nd*, that though, as in *Tukárám* v. *Khandoji* (6 Bom. H. C. Rep., 134, O.C.J.) and *Sangáppá* v. *Basáppá* (7 Bom. H. C. Rep. 1, A.C.J.), an unregistered document requiring registration may be admitted in evidence for certain purposes, yet it cannot be looked at so far as it affects the immoveable property comprised therein, nor so far as it is evidence of any transaction affecting such property, and that, excluding the part of the document of 15th July 1865 which purported to be the conveyance to B. R., the covenant for title sued on in the present suit was itself ambiguous and uncertain; and there being nothing to connect the premises, to which the covenant related, with the premises conveyed to the plaintiff, no breach of the covenant sued upon had been proved.

3*rd*, that a covenant for title, running with the land, would seem to be in itself a transaction affecting the land, and that the instrument containing it, if coming within clauses (*a*) to (*d*) of s. 17 of Act III of 1877, must be registered, unless it comes within the exceptive cls. (*e*) to (*l*) of the same section.

4*th*, that a document containing covenants for title, though, no doubt, embodying "a transaction affecting immoveable property," is admissible in a suit for damages for breach of such covenants, provided the document conform to the requirements of the exceptive clause of s. 17 of Act III of 1877; but where, as in the present case, the evidence of the covenant is contained in a document *itself* purporting to assign an interest in immoveable property—the covenant being ambiguous and uncertain without reference to such assignment—the document is not excepted from the necessity of registration.

5*th*, that the Court being precluded by the operation of the Registration Act (III of 1877) from looking at the deed of 15th July 1865 so far as it was a conveyance, the defendants were not estopped from contending that nothing having passed under it to B. R., nothing had passed to the plaintiff under the subsequent deeds, and that, consequently, the plaintiff was not entitled to maintain this suit.

6*th*, that though, under the English law, damages may be recovered for breach of covenants for title contained in a voluntary settlement of such a character as to be ineffectual without the assistance of a Court of Equity, and which assistance a Court of Equity would refuse to a volunteer, yet this, depending on the principle of English law, that a document sealed and delivered imports consideration, which principle does not hold as between Hindus, it was open to the defendants in the present case to show that the plaintiff was suing on a contract for which there was no consideration other than natural love and affection, which cannot be made the ground of a suit for damages.

7*th*, that the breach of the grantor's covenant, so far as related to his present right to convey, took place on the day the conveyance to the covenantee was executed, viz., 15th July 1865, and, consequently, a suit in respect of such breach was barred; but the covenant for quiet possession, admitting of a continuing breach, was not barred so long as the breach continued, and that of the covenant for further assurance there had been no breach at all, as such covenant would be broken only by refusal on the part of the covenantor or his representatives to execute a further assurance when required so to do by the covenantee or his representatives.

RA'JU BA'LU *v.* KRISHNARA'V RA'MCHANDRA 273

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REGULATION II OF 1827, s. 21 470
See CASTE QUESTION.

REPRESENTATIVE *VATANDA'RS* 375
See VATANDA'RS.

RES JUDICATA.] The dismissal, on the ground of want of jurisdiction, by the Civil Court of a suit to eject the defendants from the fishing ground of the plaintiffs, situate below low-water-mark, does not operate as a bar to a subsequent suit by the plaintiffs to recover damages from the defendants for fixing their fishing stakes and nets too near to those of the plaintiffs.
BA'BAN MAYACHA *v.* NA'GU SHRA'VUCHA' 19

RETROSPECTIVE ENACTMENT 148
See CIVIL PROCEDURE CODE.

SALE IN EXECUTION 258
See DECREE, EXECUTION SALE.

SALE, POWER OF 11, 252
See MORTGAGE.

SANCTION OF PROSECUTION 481
See CRIMINAL PROCEDURE CODE.

——————BY MAGISTRATE OF DISTRICT.] For the purposes of s. 468 of the Code of Criminal Procedure (Act X of 1872) a Magistrate of the First Class is subordinate to the Magistrate of the District: a sanction given by the latter to prosecute a person for intentionally giving false evidence before the former, is, therefore, legal and sufficient, notwithstanding the refusal by the former to give such sanction himself.

Semble that the Sessions Court has not power to give such sanction.
IMPERATRIX *v.* PADMANABH PAI 384

SARANJAM—Resumption—Pension, its Impartibility—Hindu Law—Adult Son's Right to demand Maintenance from his Father.] A *saranjám* is ordinarily impartible, and *semble* that a political pension granted in substitution of a resumed *saranjám* is so likewise. The Pensions Act (XXIII of 1871) prevents a Civil Court from declaring such a pension to be partible, unless the Collector should authorize it to do so; and the fact that the Collector authorizes a suit for maintenance out of such a pension, affords no ground for presuming that he authorizes a suit for the partition of the pension.

If a Hindu father possesses practically no partible property, his legitimate son, though adult, and suffering from no disability to inherit, is entitled to maintenance from him.

Himmatsing v. *Ganpatsing* (12 Bom. H. C. Rep., 94) followed.
RA'MCHANDRA SAKHA RA'M VA'GH *v.* SAKHA'RA'M GOPA'L VA'GH 346

SEA, RIGHT TO FISH IN—*Jurisdiction—Res Judicata—Cause of Action.*] The District Court has jurisdiction, when the defendants reside within its local jurisdiction, to try a suit for damages for, and to restrain by injunction an alleged illegal disturbance of the right of the plaintiff as a member of the public to fish and use fishing stakes and nets fixed in the sea below low-water-mark and within three miles of it.

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The dismissal, on the ground of want of jurisdiction, by the Civil Court of a suit to eject the defendants from the fishing ground of the plaintiffs, situate below low-water-mark, does not operate as a bar to a subsequent suit by the plaintiffs to recover damages from the defendants for fixing their fishing stakes and nets too near to those of the plaintiffs.

Rights of the Crown and of the public in the waters and the subjacent soil of the sea discussed.

The right of the public to fish in the sea, whether it and the subjacent soil be or be not vested in the Crown, is common, and is not the subject of property.

That right may, in certain portions of the sea, be regulated by local custom.

Members of the public exercising the common right to fish in the sea, are bound to exercise that right in a fair and reasonable manner, and not so as to impede others from doing the same; and conduct which prevents another from a fair exercise of his equal right, if special injury thereby results to him, is actionable.

BA'BAN MAYA'CHA' *v.* NA'GU SHRA'VUCHA' 19

SETTLEMENT, VOLUNTARY—*Damages for Breach of Covenants for title contained in—Limitation.*] Though, under the English law, damages may be recovered for breach of covenants for title contained in a voluntary settlement of such a character as to be ineffectual without the assistance of a Court of Equity, and which assistance a Court of Equity would refuse to a volunteer, yet this, depending on the principle of English law, that a document sealed and delivered imports consideration, which principle does not hold as between Hindus, it is open to a defendant to show that the plaintiff is suing on a contract for which there was no consideration other than natural love and affection, which cannot be made the ground of a suit for damages.

The breach of the grantor's covenant, so far as related to his present right to convey, took place on the day the conveyance to the covenantee was executed, viz., 15th July 1865, and, consequently, a suit in respect of such breach was barred; but the covenant for quiet possession, admitting of a continuing breach, was not barred so long as the breach continued, and that of the covenant for further assurance there had been no breach at all, as such covenant would be broken only by refusal on the part of the covenantor or his representatives to execute a further assurance when required so to do by the covenantee or his representatives.

RA'JU BA'LU *v.* KRISHNA'RAV RA'MCHANDRA 273

SMALL CAUSE COURT IN PRESIDENCY TOWNS—*Jurisdiction—Suit for Possession of Immoveable Property of a Value greater than Rs.* 500 *and less than Rs.* 1,000—*Act IX of* 1850—*Act XXVI of* 1864.] The effect of s. 2 of Act XXVI of 1864 is to extend the compulsory jurisdiction of the Courts of Small Causes in the Presidency towns, in suits to recover property, to cases where the value of the property does not exceed Rs. 1,000.

The Court of Small Causes at Bombay has, therefore, jurisdiction to try a suit for the possession of immoveable property, of a value greater than Rs. 500 and less than Rs. 1,000.

Sreemutty Shibosoondary Dossee v. *Taracknath Pandit* (2 Ind. Jur. 145, *note*) dissented from.

WA'LJI KARIMJI *v.* JAGANNA'TH PREMJI 84

——— *Jurisdiction of—Title to Immoveable Property—Form of Suit—Practice—Leave to*

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amend Summons—Act IX of 1850—*Act XXVI of* 1864.] In a suit brought under s. 91 of Act IX of 1850, the Bombay Court of Small Causes has no jurisdiction to try a question of adverse title to the immoveable property, the subject of the suit. *Aliter* if the suit be brought under s. 25 of Act IX of 1850, as extended by s. 2 of Act XXVI of 1864, and the value of the property in dispute do not exceed Rs. 1,000.

In a case involving a question of adverse title the plaintiff should be allowed to amend the summons issued under s. 91 of Act IX of 1850, so as to render it conformable with a claim under s. 25 of Act XXVI of 1864, if the summons were issued in the mistaken form by the fault of the Clerk of the Court, and not of the plaintiff.

NOWLA' OOMA' *v.* BA'LA' DHURMA'JI 91

SMALL CAUSE COURT IN MOFUSSAL—*Jurisdiction—Suit by Plaintiff as Owner to recover Moveable Property under Rs.* 500—*Act X of* 1877.] The plaintiff was owner of moveable property attached in execution of a decree, and his claim to such property having been rejected under s. 246 of Act VIII of 1859, he brought this suit to recover possession.

Held that the suit was cognizable by a Mofussal Court of Small Causes.

Quære—Whether the new Civil Procedure Code (Act X of 1877) prevents or allows a suit, like the present, to be brought in a Court of Small Causes.

NATHU GA'NESH *v.* KA'LIDA'S UMED 365

———*Jurisdiction—Execution of Decree.*] Small Cause Courts in the Mofussal are not at liberty to execute decrees against moveable property beyond their local jurisdiction.

MUNSUK MOSUNDA'S *v.* SHIVRA'M DEVISING 532

———*Arrest.*] A Court of Small Causes may issue a warrant for the arrest of a person residing in another district, but not if he resides within the same district in which the Court is situate, but outside its local jurisdiction.

CHUNILA'L SOBHA'RA'M *v.* PURBHUDA'S KURSANDA'S ... 560

———*Jurisdiction—Suit for Maintenance.*] In the absence of any special bond or other contract for the payment of maintenance, a suit for maintenance is not cognizable in a Court of Small Causes in the Mofussal.

SIDLINGA'PA' *v.* SIDA'VA' 624

———*Jurisdiction—Suit for Maintenance.*] In a suit by a Hindu widow against her husband's brother for an allowance as maintenance and for the expenses of a pilgrimage;

Held (following *Sidlingápá* v. *Sidává kom Sidlingápá*) that the suit, although for a sum under Rs. 500, was not cognizable by a Court of Small Causes under Act XI of 1865, there being no allegation that the maintenance claimed was secured by bond or other special contract.

APA'JI CHINTA'MAN DEVDHAR *v.* GANGA'BA'I 632

———*Insolvency—Jurisdiction.*] The effect of s. 5 of the Code of Civil Procedure (Act X of 1877), coupled with the second schedule to that Act, is to render the whole of ch. xx (relating to insolvent debtors) of the Code, including s. 360, inapplicable to Courts of Small Causes in the Mofussal, notwithstanding

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the words "any Court other than a District Court" and "any Court situate in his district" which occur in that section. Consequently, the Government Resolution No. 2133, of the 3rd of April 1878, investing the Judge of the Court of Small Causes at Ahmedabad with powers, under the said chapter, to adjudicate in insolvency matters, is *ultra vires* and invalid.
LALU GANESH *v.* RANCHHOD KAHANDA'S 641

SPECIFIC PERFORMANCE OF CONTRACT TO SETTLE PROPERTY ON ADOPTED SON 67
See ADOPTION.

STATUTE, CONSTRUCTION OF 148
See CIVIL PROCEDURE CODE.

STATUTE OF DISTRIBUTION (22 & 23, CAR. II, CH. 10), S. 5 ... 75
See SUCCESSION ACT.

SUCCESSION ACT (INDIAN) X OF 1865, S. 42—*Pársis—Distribution—Advancement—Statute of Distribution (22 & 23, Car. II, ch. 10), s. 5—Pársi Succession Act (XXI of 1865) s. 8—Administration—Limitation—Liability of the Share of one of the next of kin for a Debt due by him to the Intestate, but barred at the date of the death of the latter—Cause of Action—Claim against Estate of Intestate on account of moneys paid after his death for the surviving members of his family—Married Woman—Separate Property.*] In excluding by s. 8 of the Pársi Succession Act, from application to Pársis, s. 42 of the Indian Succession Act, which repeals the English rule as to advancement contained in the Statute of Distribution, s. 5, it was not the intention of the Legislature to preserve the last-mentioned rule in force for the Pársi community.
Semble that the rule followed by the Courts of Equity in England, whereby, notwithstanding the provisions of the Statutes of Limitation, the share of one of the next of kin in the estate of an intestate, while in the hands of the administrator, is liable for a debt due by the next of kin to the deceased, though barred at the date of the death of the latter, is to be applied in the Courts of British India. The rule laid down in *Graham* v. *Londonderry* (3 Atk. 393,) with regard to the husband's rights over ornaments given to his wife by her father, applied to Pársis.
DHANJIBHA'I BOMANJI GUGRA'T *v.* NAVAZBA'I 75

SUCCESSION—*Illegitimacy—Custom.*] The illegitimate son of a married woman by a *Gosávi* with whom she is living in adultery while undivorced from her lawful husband cannot inherit his father's property.
A custom recognizing a right of heirship in an illegitimate son by an adulterous intercourse would be bad.
NA'RA'YAN BHA'RTHI *v.* LAVING BHA'RTHI 140

SUIT FOR POSSESSION OF IMMOVEABLE PROPERTY OF A VALUE GREATER THAN Rs. 500, AND LESS THAN Rs. 1,000 84
See SMALL CAUSE COURT.

SUMMONS, LEAVE TO AMEND 91
See PRACTICE IN SMALL CAUSE COURT.

———SUBSTITUTED SERVICE OF—*Practice.*] Where substituted service of the summons is ordered under s. 82 of the Civil Procedure Code (X of1877), a sufficient time ought, under s. 84, to be given for notice of the fact to reach the defendant,

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wherever he may be; and, if an *ex-parte* decree be obtained by the plaintiff, the Court, on being satisfied that the time fixed was insufficient, will set aside the decree.
MIRZA ALLY BEBANEE *v.* SYED HYDER HOOSEIN 449

SURETIES—*Extent and Duration of their Liabilities* 654
See CIVIL PROCEDURE CODE (ACT VIII OF 1859, s. 338).

TALABDA KOLI CASTE, ADOPTION IN 67
See ADOPTION.

TITLE, COVENANTS FOR, DAMAGES FOR BREACH OF ... 273
See SETTLEMENT.

TRADESMAN'S ACCOUNT—*Splitting Cause of Action.*] A tradesman cannot, by keeping separate accounts of his dealings with a customer, split his cause of action so as to bring his suit within the jurisdiction of a Small Cause Court in the Presidency towns.
CASSUM JOOMA *v.* THUCKER LILADHUR KISSOWJI ... 570

TRUSTEE ... ...
An executor, who by the will is made an express trustee for certain purposes, is, as to the undisposed of residue, a trustee within the scope of s. 2 of Act XIV of 1859, for the heir or heirs of the testator.
LALLUBHA'I BA'PUBHA'I *v.* MA'NKUVARBA'I 388

VAKALA'TNA'MA' 362
See VAKIL AND CLIENT.

VAKIL AND CLIENT—*Vakalátnáma—Agreement without Consideration—Nudum Pactum—Inám Chithi.*] An agreement, executed by a client to his *vakil*, after the latter had accepted a *vakalátnáma* to act for the former in a certain suit, whereby the client bound himself to pay to the *vakil*, in the event of his conducting the suit to a successful termination, a certain sum in addition to the *vakil's* full fees, *held nudum pactum*, and a suit founded upon it dismissed as unsustainable.
RA'MCHANDRA CHINTA'MA'N *v.* KALU RA'JU 362

VA'NIA' CASTE 8
See MARRIAGE, INHERITANCE.

VATANDA'RS, REPRESENTATIVE 375
See HEREDITARY OFFICES (BOMBAY) ACT.

VOLUNTARY SETTLEMENT 273
See SETTLEMENT.

WIDOW, HINDU—*Nature of her Estate in Immoveable Property* ... 67
See HINDU LAW.

———MAINTENANCE OF 494
See HINDU LAW.